IN THE

Supreme Court of the United States

OCTOBER TERM, 1941
No. 252

ALLEN-BRADLEY LOCAL NO. 1111, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, ET AL.,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD AND ALLEN-BRADLEY COMPANY,

Respondents.

Appeal from the Supreme Court of the State of Wisconsin

Brief of Respondent Wisconsin Employment Relations Board

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INDEX

Page

POINT V

POINT VI

CASES CITED

STATUTES

UNITED STATES ACTS

MISCELLANEOUS

TEXTS

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On October 13, 1941 this Court noted probable jurisdiction of this appeal.

OPINIONS OF THE COURT BELOW

The opinion of the State Supreme Court in this case is reported in 237 Wis. 164, 295 N. W. 791. It is printed in the record, pp. 37-55.

JURISDICTION

The jurisdiction of this Court rests on sec. 237A of the Judicial Code (28 U. S. C. A., sec. 344 (a)).

STATEMENT OF THE CASE

The case is adequately stated in appellants' brief, pp. 2-8 with the following additions:

The stipulation with respect to jurisdiction of the National Board went no further than to state that the National Board would have jurisdiction in an employer unfair labor practice case if the National Board, pursuant to charges filed, if any were filed, assumed jurisdiction by issuing a complaint against the Allen-Bradley Company charging it with unfair labor practices under the Federal Act. The stipulation was as follows: (R. p. 36)

> "Mr. Mann: I'll state on the record, if the Board please, that if the National Labor Relations Board, pursuant to charges filed, if any were filed, assumed the jurisdiction by issuing a complaint against the Allen-Bradley Company charging it with unfair labor practices under the federal act, that the company would concede the jurisdiction of the National Act to proceed in connection with such a complaint in so far as matters of interstate commerce are concerned. Doesn't that do what you want, Mr. Geline?
>
> "Mr. Geline: Yes, I think that is satisfactory."

The company's complaint, filed with the State Board, charged violations of sec. 111.06 (2), (a), (e), (f), (h) and (j) (R. 29-30) of the State Employment Peace Act. These violations all relate to employee unfair labor practices.

At the hearing before the State Board the appellants' objection was that by reason of the company's being engaged in interstate commerce "and that by reason thereof is subject exclusively to the provisions of the National Labor Relations Act * * * and to the exclusive jurisdiction of the National Labor Relations Board, and that the Wisconsin Employment Relations Board is without jurisdiction to proceed on the complaint filed under and pursuant to the provisions of the Wisconsin Employment Relations Act for the reason that said Act is in conflict with the National Labor Relations Act, and that the National Labor Relations Act is exclusive and permanent with respect to the matters set forth in the complainants' complaint". (R. 35)

The interlocutory order of the Board did not differ materially from the final order. It appears in the record on pp. 20-21.

With respect to the union, finding 10 of the Board appears to be inadvertently omitted in appellants' statement of the case (p. 5 of appellants' brief). This finding reads:

> "That the Union, by its officers and many of its members, injured the person and property of employes of the company who desired to continue their employment with such company." (R. p. 14)

No question was ever raised as to the constitutionality of the Wisconsin Act itself. It was conceded to be a valid law, The challenge went to the application of the Act and not to the constitutionality of the Act itself. Appellants stated their position in their brief in the Supreme Court of the State as follows:

> "The two issues on which this appeal is grounded are: first, whether the Wisconsin Act is constitution-

ally enforceable for any purpose to employees and unions engaged in an industry in interstate commerce and subject to the National Act; and, second, if the Court rules that the Wisconsin Act is applicable for some purposes, can it be so applied as to terminate the employee status of strikers in a manner which is in conflict with the National Act?

"This appeal in no manner challenges the constitutionality of the Wisconsin Act as to intrastate commerce. No such issue is presented in this case. All our arguments are predicated on the assumption that the Company is engaged in interstate commerce and subject to the National Act." (Appellants' brief in Supreme Court, pp. 8-9). See statement of Chief Justice Rosenberry in the opinion, R. 40-41.

No issue was raised in the Supreme Court of the State to the effect that the Federal Government in the National Labor Relations Act and related legislation has laid down a policy governing labor relations affecting interstate commerce to the exclusion of any state legislation dealing with precisely the same subject, even though entirely in harmony with and identical in language, purpose, intent and structure with the National Labor Relations Act (appellants' Point I).

Appellants stated their position in their brief in the Supreme Court of the State as follows:

"* * * We do not, in this appeal, attack the validity of the decision in *Fred Rueping Leather Co. v. Wisconsin Labor Relations Board*, 228 Wis. 475, ruling that the National Labor Relations Act had not preempted the field of labor relations, and that the Wisconsin Labor Relations Act of 1937 is equally applicable to parties engaged in interstate commerce and sub-

ject to the National Labor Relations Act. We assume, for purposes of appeal to this Court, that the state retains the right, based on its police powers, to enact a labor relations law which is consistent with the federal regulation of the same subject." (Appellants' brief, pp. 59-60)

ISSUES SOUGHT TO BE RAISED BY THIS APPEAL —DISPOSITION OF SUCH ISSUES BY THE COURT BELOW

Appellants apparently seek to raise four issues as follows:

(1) That the Federal Government in the enactment of the National Labor Relations Act and related legislation has laid down a policy governing labor relations affecting interstate commerce to the exclusion of any state legislation dealing with precisely the same subject, namely the subject of collective bargaining; (2) That the provisions of the Wisconsin Employment Peace Act are repugnant to and in conflict with the provisions of the National Labor Relations Act; (3) That the order of the Wisconsin Employment Relations Board upheld by the State courts is beyond the constitutional jurisdiction of the State Board; and (4) That the Wisconsin Employment Peace Act is an unconstitutional exercise of the police power of the State.

Issue (1) to the effect that the Federal Government has preempted the field of collective bargaining relations affecting interstate commerce to the exclusion of any state legislation dealing with precisely the same subject was not in issue in the Court below.

The second issue sought to be raised in this case was disposed of adversely to appellants' contention by the Court below upon the ground that the case presented no question of conflict with the provisions of the National Labor Relations Act.

The third and fourth issues sought to be raised are grounded upon the first and second. They were disposed of adversely to the appellants' contentions.

SUMMARY OF ARGUMENT

I.

The appellants are without standing to raise the issues sought to be raised. They seek to vindicate public rights without showing invasion of any of their own constitutional rights. The National Labor Relations Act is a public Act. It does not confer either private rights or remedies.

No claim is asserted that the National Labor Relations Act preempted the field of labor relations to a point where the State has lost its police power to deal effectively with conduct such as that involved in sec. 111.06 (a) and (f),—the only two sections of the Act upon which the order of the Board was based,—the only two sections of the Act applied to appellants in the case at bar. No claim is made that the appellants have any right to engage in conduct prohibited by the order of the Board in question. The sections of the Act involved in the case at bar and the order of the Board based thereon prohibit conduct which is unlawful conduct in any civilized society.

While it is asserted generally in the appellants' brief that the Employment Peace Act is unconstitutional upon its face, no such claim was ever asserted in the Court below. The appellants are accordingly precluded from making such assertions here. It was conceded in the Court below that

the Act was a constitutional law. The only claim ever asserted in the Court below was that the Act could not be constitutionally or validly applied if an employer's business was such as to subject him to the jurisdiction of the National Board. The most that was ever asserted in the Court below was a feared invalid application of a constitutional statute. That is the most that can be asserted here. The principles underlying, when constitutional issues or questions are presented to this Court, clearly establish that a litigant may not champion the constitutional rights of others when his own constitutional rights in the case under consideration are not affected; may not seek an advisory opinion and may not seek a declaratory judgment. A litigant may not challenge the constitutionality of a constitutional law in advance of an application of such legislation which can itself be challenged as an unconstitutional application.

II.

The appellants are precluded from asserting that the Federal Government in the National Labor Relations Act and related legislation has laid down a policy governing labor relations affecting interstate commerce to the exclusion of *any* State legislation dealing with precisely the same subject as no such question was raised in the Court below. Not only was the point not raised, the point appellants now seek to make is directly contrary to the concession which they made in the Court below.

III.

In any event, the Federal Government in the enactment of the National Labor Relations Act has not preempted the field of labor relations affecting interstate commerce to the

exclusion of *any* state legislation dealing with precisely the same subject.*

The intent of Congress to preclude the exercise by the State of its police power which would be valid if not superseded by Federal action must be *clearly* manifested. The nature of the subject matter regulated by the National Labor Relations Act requires an *especially* clear showing of congressional intent to preempt. Any concept of the *scope* of the National Act such as appellants propose goes to the very essence of the relation between State and Federal government. The origin, scope and purpose of the National Act show no such intent. The cases applying the National Act do not disclose any such intent but rather disclose an intent to the contrary. The subject dealt with (labor) is one from which Congress by its legislation habitually does not exclude the states. In subject matter fields of similar or *less* import with respect to the essence of the relationship between State and Federal government, Congress uniformly enters the field without preempting and by legislation similar in method and structure to the National Labor Relations Act. The sort of remedy provided indicates the continuance of State power.

The National Labor Relations Act does not exclude the states from the field of labor relations "affecting commerce" until the National Labor Relations Board has entered an order concerning practices of a particular employer.

The pattern of all recent federal legislation and executive action reveals a general purpose to cooperate with, rather than to supplant, the states in socio-economic legislation. This Court has shown no disposition to adopt an attitude out of harmony with other departments of government. All of the recent decisions of this Court show a disposition to interpret the national constitution and statutes

*The argument upon this branch of the case is not concerned with conflicting state legislation of constitutional proportions.

to protect the states' legislative power against nullification *by implication* from congressional action or inaction. In view of the expansion of exercise of federal power, this has been a necessary trend if the federal system under the constitution is to be maintained.

The only criteria which appellants advance in support of their preempted field argument is that of the Congress having "occupied the field" and dealt with the "'same subject"—the weakest kind of criteria and recognized as meaningless. No cases are cited in support of appellants' position except (1) Hines v. Davidowitz, 312 U. S. 52, 85 L. ed. 366, 61 S. Ct. 399 (1941)—clearly distinguishable; (2) National Labor Relations Board cases which do not remotely support the position taken; and (3) railroad cases. The inapplicability of early railroad cases as applied to a subject matter such as labor relations is apparent. This Court has recognized the inapplicability of such cases as applied to a cognate field "unfair competition".

The appellants' arguments are largely arguments which might be addressed to Congress as reasons why the Congress should preempt the field (if it has constitutional power to do so). They are not arguments which are of any relevancy in relation to the intent of Congress to preempt the field.

IV.

Appellants have no standing to raise any question of repugnance or conflict, but even if they have, there is no repugnance or conflict in the provisions of the Wisconsin Employment Peace Act with the National Labor Relations Act "so direct and positive" that the two acts cannot be reconciled or consistently stand together. The Act does not stand as an obstacle to full effectuation of the policy of the National Act. The underlying fallacy of appellants' argu-

ments upon this branch of the case (as upon all others) is that of (1) ignoring entirely the constitutional limitations upon congressional power to act and (2) the *limited* extent to which Congress did act in enacting the National Act. The National Act seeks to redress an inequality of bargaining power by forbidding *employers* to interfere with the development of employee organization, thereby removing *one* of the issues most provocative of industrial strife and bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which the employer cannot trade upon the economic weakness of his employees. The National Act is concerned with and deals only with employer unfair labor practices. The National Board has jurisdiction only with respect to employer unfair labor practices. As to when an employer's unfair labor practices denounced by the Act do have such a close and substantial relation to interstate commerce as to tend to substantially burden and obstruct that commerce, the Congress deliberately left the solution of any such question to the National Labor Relations Board which the Act established.

The case at bar does not involve employer unfair labor practices. It deals with matters entirely outside the scope of the National Act and beyond the jurisdiction of the National Board. The appellants' objection that the National Labor Relations Board had exclusive jurisdiction over the unfair labor practices charged by the company, is without merit. That Board not only had no exclusive jurisdiction,—it had no jurisdiction. Appellants are without standing to raise any question of conflict or repugnance between the State and Federal Acts—no constitutional rights of appellants have been invaded. The constitutional approach to the question as to whether there is such a repugnance or conflict between the provisions of the two Acts so direct and positive that they cannot be reconciled or consistently stand together (if such question were presented, which it

is not) is just the opposite approach from that which appellants take in their analysis of the question.

The State Act does not discourage collective bargaining in labor relations affecting interstate commerce. The State redresses the inequality of bargaining power by forbidding employers to interfere with the development of employee organization and thereby seeks to remove one of the issues most provocative of industrial strife and bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which the employer cannot trade upon the economic weakness of his employees to the full extent that the National Act protects against such practices. The Wisconsin Court recognizes that such is a major purpose of the Act and that it seeks to protect collective bargaining from employer unfair labor practices (the only practices against which the National Act protects collective bargaining) to the full extent and just as completely and effectively as does the National Act. The mere fact that the Wisconsin Act omits any positive declaration in favor of promoting collective bargaining, when it is recognized that a basic concept of the Act is to promote collective bargaining, hardly raises a conflict of constitutional proportions.

The difference between the definition of a labor dispute and that found in the Wisconsin Act is an immaterial difference. In nearly three years' administration of the State Act, no one has been able to find where the definition of a labor dispute in that Act is of any significance at all. The appellants misstate the import of sec. 111.06 (2) (e) as construed by the Supreme Court of the State, as well as the affect of the Act with respect to terminating employee rights under the Act. There is full scope for operation of the principle of the *Mackay Radio & Telegraph Co. case* under the State Act. The Wisconsin Court has specifically recognized such to be true, both in this case and in *Appleton Chair Corp. v. United Brotherhood*, etc., 239 Wis. 333.

There is no conflict as to the rights of a minority union to bargain collectively (in the sense in which appellants use the term) with respect to wages, hours and working conditions for its members only. The situation is exactly the same under the State Act as under the National Act. Even if the situation were not exactly the same, the difference would not be one of constitutional proportions.

The appellants' argument upon the alleged conflict as to the appropriate bargaining unit is predicated upon an erroneous premise. The premise is that if the State sets up a craft unit and recognizes same, such unit is entitled to recognition under the State law, even though the National Board may set up an industrial unit as the exclusive bargaining unit. The Supreme Court in its opinion in this case specifically recognizes that any action taken by the National Board determining the appropriate unit is final and conclusive. The State Act merely lets the affected employees themselves determine appropriate collective bargaining units up to a point where the Federal government, acting pursuant to its superior authority and through its agency, determines that some other unit is a more appropriate collective bargaining unit than that established by the State law. Such situation presents no question of irreconcilable conflict of constitutional proportions.

Unless it can be said that the Congress, by enacting the National Act, has conferred upon employees the right to intimidate an employee in the enjoyment of his legal rights; the right to intimidate an employee's family; the right to picket the domicile of an employee; the right to injure the person or property of such employee or his family; the right to mass picket; the right to commit acts of violence; and so on, and so forth, and to do any and all of the things declared by the Employment Peace Act to be unfair labor practices, the unfair labor practices denounced as such by sec. 111.06 (2) and (3) (employee and third person unfair labor practices), there is no conflict of constitutional pro-

portions between the State Act and the National Act. The constitutional power of Congress to usurp the police power of the State to such an extent would be extremely doubtful. The National Act so interpreted would be of doubtful constitutionality. The conclusion is irresistible that Congress never intended to usurp the police power of the State to any such extent. The Congress either has or has not preempted the field. If it has preempted the field, the State police power is gone and it matters not in what form the police power is exerted. If the Congress has not preempted the field, the State may exercise its police power provided no undue or discriminatory burdens are put upon interstate commerce. No pretense is made that the Wisconsin Act places any undue or discriminatory burdens upon interstate commerce.

The appellants do not assert that the State police power is gone. They assert that the State may not exercise its police power through an administrative agency dealing with labor relations. If the State has police power, the matter of how that power should be exercised is entirely one within the legislature's range of choice.

The difference in definition of an employee is immaterial. This definition is of no significance in the administration of the Act. Finally it is asserted that sec. 111.07 (4) of the State Act, which permits the Board to suspend "rights, immunities, privileges or remedies granted or afforded by the Act" for not more than one year, is an irreconcilable difference. In the first place, the Board did not exercise any such power in the instant case. In the second place, the Board has never yet exercised this power. Under the circumstances, the appellants are without standing to raise the question of conflict. In the third place, there is no provision in the Act which by the mere force of its enactment presents any question of conflict.

Contrary to appellants' assertions, the Wisconsin Court has not held that the Board has power to suspend the bar-

gaining privileges of a union or of employees with respect to employers who, in a proper case, would be subject to the jurisdiction of the National Board. The Court held that no suspension of status for purposes of administering the Wisconsin Act had been exercised in the particular case and that for that reason no question of conflict was presented in the case at bar.

Judicial decisions with respect to the National Act have not established that the employee status of strikers for purposes of collective bargaining continues regardless of minor acts of disorder. The most the courts have held is that a National Board order of reinstatement with respect to such employees is within the discretionary power of the Board. This Court has never yet confirmed such a power in the National Board. In a cognate situation, *Nat'l. L. R. Bd. v. Fansteel Metal. Corp.*, 306 U. S. 240, this Court held such an order of reinstatement to be beyond the power of the National Board. In any event the State Board has the same discretionary power with respect to reinstatement of such employees as the National Board. There is no question of conflict in this regard. The Board has ample power both by virtue of discretion committed to it, and sec. 111.17 and sec. 111.18 to so administer the State Act as never to present any serious questions of conflict with any national policy evinced in the National Labor Relations Act. It cannot be presumed that the Board will abuse its discretion. It did not do so in the instant case. It will be time enough to deal with any abuse of discretion when a case arises presenting the abuse.

V.

The order of the Wisconsin Employment Relations Board, upheld by the state courts, was not beyond the jurisdiction of the state board. The appellants' entire argument

contra is grounded upon a so-called irreconcilable conflict between the State Act and the National Act because of the limited discretionary power vested in the Board by sec. 111.07 (4) to suspend rights, immunities, privileges or remedies granted or afforded by the Act for not more than one year.

The appellants admit that the conflicts between the two Acts boil down to one essential point. That point is asserted to be that the State Act *requires*, as a penalty, employees who have violated local police laws to forego collective bargaining privileges and rights. The State Act requires no such penalty. The conflicts are accordingly boiled down to nothing.

The concept that this particular provision of the Act goes to the jurisdiction of the Board is a new concept of jurisdiction. The Board obviously had jurisdiction. The only question that could be presented was whether, in relation to this particular controversy, the Board could exercise any discretion granted by this particular clause of the Act. That question would not go to the jurisdiction of the Board. It would simply go to the *power* of the Board to exercise any discretion under this particular clause under the *facts* of the instant case.

It is inaccurate to state that Board action under this clause deprives the individuals of their employee status for the purposes of collective bargaining. The employees would not by such suspension lose collective bargaining rights. They would lose protection of the Wisconsin Act. The appellants seek, in this case, to establish that the National Act preempts the field. They want no protection except the protection of the National Act. Board suspension of rights, immunities, privileges or remedies granted or afforded by the Wisconsin Act, would give the appellants just what they want,—the Federal Act as their sole protection.

VI.

The Wisconsin Employment Peace Act is not an unconstitutional exercise of the police power of the state. The appellants' argument contra seeks to have the entire Act declared unconstitutional, in spite of the express provisions of sec. 111.17 and sec. 111.18, if any provision of the Act cannot be applied to *all* situations that may arise. The appellants are precluded from arguing any such question. They never challenged the validity of the Wisconsin Act as an Act. The closest that appellants have ever come to raising any question is a feared invalid application of a concededly constitutional statute. Appellants' contention is in any event without merit.

ARGUMENT

POINT I

THIS APPEAL DOES NOT PRESENT THE ISSUES SOUGHT TO BE RAISED.

A. The appellants are without standing to raise the issues sought to be raised—they seek to vindicate public rights without showing invasion of any of their own constitutional rights.

The National Labor Relations Act is a public Act. It does not confer either private rights or remedies. Thus in *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U. S. 261, 84 L. ed. 738 (1940) it was held that the National Act merely recognizes a natural right,—the right of labor to organize and bargain collectively; that the Act denounces certain unfair labor practices of employers which interfere with the free exercise of such right; sets up an

administrative agency with exclusive powers to administer the Act and with limited power to prevent such practices and grant remedial relief insofar as such unfair labor practices of employers denounced by the Act tend to substantially burden and obstruct interstate commerce. The case further holds that the Act is a public Act and that no private rights are conferred thereby. See also *National Licorice Co. v. Nat'l. L. Rel. Bd.*, 309 U. S. 350, 84 L. ed. 799, 60 S. Ct. 569 (1940).

The whole tenor of appellants' argument is that of vindication of what appellants conceive to be a national policy with respect to labor relations and without showing in anywise wherein any constitutional right of their own has been invaded. It goes without saying that appellants are not the guardians and protectors of a supposed federal policy with respect to labor relations affecting interstate commerce and that they must show invasion of some constitutional right of their own by the state statute as construed and applied to them before they are entitled to raise the issues sought to be raised by this appeal.

As the National Act confers no private right or remedy, it is most difficult to see wherein any constitutional right of appellants under the National Act is or can be invaded by the Wisconsin Act and particularly by the sections of the Act which have been applied to them which are involved in the order of the Board, namely sec. 111.06 (2), (a) and (f), which read as follows:

> "(2) It shall be an unfair labor practice for an employe individually or in concert with others:
>
> (a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket

his domicile, or injure the person or property of such employe or his family.

• • •

(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance."

The principles underlying when constitutional issues or questions are presented to this Court were reviewed by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 345, 80 L. ed. 688, 710, 56 S. Ct. 466 (1936) from which we quote.

"The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions. On this ground it has in recent years ordered the dismissal of several suits challenging the constitutionality of important acts of Congress. In Texas v. Interstate Commerce Commission, 258 U. S. 158, 162, 66 L. ed. 531, 537, 42 S. Ct. 261, the validity of titles III. and IV. of the Transportation Act of 1920. In New Jersey v. Sargent, 269 U. S. 328, 70 L. ed. 289, 46 S. Ct. 122, the validity of parts of the Federal Water Power Act. In Arizona v. California, 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522, the validity of the Boulder Canyon Project Act. Compare United States v. West Virginia, 295 U. S.

463, 79 L. ed. 1546, 55 S. Ct. 789, involving the Federal Water Power Act, and Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 71 L. ed. 541, 47 S. Ct. 282, where this Court affirmed the dismissal of a suit to test the validity of a Kentucky statute concerning the sale of tobacco; also Massachusetts State Grange v. Benton, 272 U. S. 525, 71 L. ed. 387, 47 S. Ct. 189." (p. 710)

The fifth principle laid down was as follows:

"The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. Tyler v. Judges of Ct. of Registration, 179 U. S. 405, 45 L. ed. 252, 21 S. Ct. 206; Hendrick v. Maryland, 235 U. S. 610, 621, 51 L. ed. 385, 390, 35 S. Ct. 140. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained. Columbus & G. R. Co. v. Miller, 283 U. S. 96, 99, 100, 75 L. ed. 861, 865, 866, 51 S. Ct. 392. In Fairchild v. Hughes, 258 U. S. 126, 66 L. ed. 499, 42 S. Ct. 274, the Court affirmed the dismissal of a suit brought by a citizen who sought to have the Nineteenth Amendment declared unconstitutional. In Massachusetts v. Mellon, 262 U. S. 447, 67 L. ed. 1078, 43 S. Ct. 597, the challenge of the federal Maternity Act was not entertained although made by the Commonwealth on behalf of all its citizens."

This principle would seem to be peculiarly applicable to the case at bar. What personal or property right is sought to be vindicated by the appellants in the instant case? As the National Labor Relations Act conferred no personal or property right upon appellants it would seem

apparent that what appellants seek to do is to vindicate public rights with no personal or property right involved.

No claim is asserted that the National Labor Relations Act preempted the field of labor relations to a point where the State has lost its police power to deal effectively with conduct such as that involved in sec. 111.06 (a) and (f),—the only two sections of the Act upon which the order of the Board was based,—the only two sections of the Act applied to appellants in the base at bar. No claim is made that the appellants have any right to engage in conduct prohibited by the order of the Board in question. No such claim could be successfully asserted. The sections of the Act involved in the case at bar and the order of the Board based thereon prohibit conduct which are acts of clear wrong doing. They are acts which constitute violations of law in any society. They are acts, the commission of which in the long run are not in the best interests of the country or of labor itself. They are acts against which concededly the National Act affords no remedy. Such being true, it is obvious that the appellants are seeking to champion the alleged constitutional rights of others without any showing as to wherein their own alleged constitutional rights have been invaded.

While it is asserted generally in the appellants' brief that the Employment Peace Act is unconstitutional on its face, no such claim was ever asserted in the Court below. It was conceded that the Act was a constitutional law. The only claim ever asserted in the Court below was that the Act could not be constitutionally or validly applied if an employer's business was such as to subject him to the jurisdiction of the National Board. The most that was asserted in the Court below was a feared invalid application of a

constitutional statute. The most that can be asserted here is a feared invalid application of a constitutional statute. The case at bar does not present any invalid application of a constitutional statute. It would accordingly seem quite apparent that appellants are wholly without standing to raise the issues sought to be raised. We know of no instance where this court has permitted a constitutional challenge to constitutional legislation in advance of an application of such legislation which can itself be challenged as an unconstitutional application. The Court does not sit to render advisory opinions or declaratory judgments.

B. The law upon the subject as to when litigants may raise constitutional issues.

No principle of law is more firmly established than the one that a litigant may not champion the constitutional rights of others when his own constitutional rights in a case under consideration are not affected.

In *Lehon v. City of Atlanta*, 242 U. S. 53, 56, 61 L. ed. 145 (1916), the Court said:

> "* * * To complain of a ruling one must be made the victim of it. One cannot invoke to defeat a law an apprehension of what might be done under it and, which if done, might not receive judicial approval."

In *Hicklin v. Coney*, 290 U. S. 169, 78 L. ed. 247, 250 (1933) the Court said:

> "Another objection, that the Railroad Commission was authorized to regulate the rates of private contract carriers, was answered by the state court

in saying that the Commission had never exercised such a power, 'if any it has under the act,' and hence that appellant had no ground for complaint. This is an adequate answer here, on the present showing, as the Court does not deal with academic contentions. Stephenson v. Binford, supra (287 U. S. 251, 277, 77 L. ed. 301, 53 S. Ct. 181, 87 A.L.R. 721)."

In *Stephenson v. Binford*, 287 U. S. 251, 77 L. ed. 288, 301 (1932) the Court said:

"The provision of Sec. 13, requiring every motor carrier, whether operating under permit or certificate, to furnish a bond and policy of insurance conditioned that the obligor will pay, among other things, for loss of, or injury to, property arising out of the actual operation of the carrier, is construed by appellants as including cargoes carried by them, and is assailed as a requirement bearing no relation to public safety, but as an attempt to condition the purely private contractual relationship between shipper and private carrier. It is said that the proviso which prohibits the commission from requiring insurance covering loss of, or damage to, *cargo* in an excessive amount requires the construction suggested. So far as appears no attempt yet has been made to enforce the provision against any of these appellants, and until that is done they have no occasion to complain. Moreover, no state court thus far has dealt with the question, and unless obliged to do otherwise, we should not adopt a construction which might render the provision of doubtful validity, but await a determination of the matter by the courts of the state. Utah Power & L. Co. v. Pfost, 286 U. S. 165, 186, 76 L. ed. 1038, 1049, 52 S. Ct. 548."

In *Bandini Petroleum Co. v. Superior Ct.*, 284 U. S. 8, 76 L. ed. 136, 145 (1931) the Court said:

"* * * It is not necessary to go further and to deal with contentions not suitably raised by the record before us. Constitutional questions are not to be dealt with abstractly. * * *"

"* * * If the assailed provisions as construed and applied in the present case afford due process, appellants cannot complain that in earlier cases they were so construed and applied as to deny due process to other litigants. * * *" *Atlantic Coast Line R. Co. v. Ford*, 287 U. S. 502, 77 L. ed. 457, 460 (1933).

"* * * Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." *Associated Press v. Nat'l. L. Rel. Bd.*, 301 U. S. 103, 81 L. ed. 953, 960 (1937).

In *Henneford v. Silas Mason Co.*, 300 U. S. 577, 583, 81 L. ed. 814, 819 (1937), a Washington tax upon use of personal property was challenged as unconstitutional. It was argued that the definition of "use" in the rules of the Commission was such as to make the tax in effect a sales tax and subject to the same objections as a sales tax. The Court, through Justice Cardozo, said:

"* * * If the rules are too drastic in that respect or others, the defect is unimportant in relation to this case. Here the machinery and other chattles subjected to the tax have had continuous use in Washington long after the time when delivery was over. The plaintiffs are not the champions of any rights except their own." (p. 583)

In *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 81 L. ed. 1193, 1203 (1937) it was urged that

a State tax on general stores constituted an interference with interstate commerce because the statute permitted the supervisor of public accounts to include mail order houses, order stations and department stores in making a computation with respect to the plaintiff's retail business. In relation to this argument the Court said: (p. 1203)

> "* * * For all that appears neither its mail order houses, nor its order stations, nor its department stores, will be included in the computation.
>
> "It is manifest that Montgomery Ward & Company cannot upon mere supposition that the Act will be unconstitutionally construed and applied in respect of its five stores in Louisiana obtain an advisory decree that the Act must not be so administered as to burden or regulate interstate commerce."

The Court cited among other cases *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288, 80 L. ed. 688, 710, 56 S. Ct. 466 (1936).

In *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 76 L. ed. 1038, 1049 the Court said:

> "* * * It does not appear that appellant is presently in any such danger of an unconstitutional application of these provisions of the statute as to entitle it to invoke a decision here upon the question, and the rule is well settled that 'a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage.' Dahnke-Walker Mill. Co. v. Bondurant, 257 U. S. 282, 289, 66 L. ed. 239, 243, 42 S. Ct. 106; Oliver Iron Min. Co. v. Lord, supra (262 U. S. pp. 180, 181, 67 L. ed. 936, 937, 43 S. Ct. 526); Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 S. Ct. 167, 7 N. C. C. A. 570; Gorieb v. Fox, 274

U. S. 603, 606, 71 L. ed. 1228, 1230, 53 A. L. R. 1210, 47 S. Ct. 675. Primarily, the construction of these provisions of the statute is for the state supreme court, and we cannot assume in advance that such a construction will be adopted, or such an application made of the provisions, as to render them obnoxious to the federal Constitution. * * *"

In *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 85 L. ed. 243, 61 S. Ct. 291, 306 (1940) the Court said: (S. Ct.)

"The briefs and arguments at the bar have marshaled reasons and precedents to cover the wide range of possible disagreement between Nation and state in the functioning of the Federal Power Act. To predetermine, even in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions. * * *"

In *Voeller et al. v. Neilston Warehouse Co. et al.*, 311 U. S. 531, 61 S. Ct. 376, 378, 85 L. ed. 322 (1941) the Court said: (S. Ct.)

"* * * Exercising the very delicate responsibility of passing upon the validity of state statutes, this court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions. * * *"

Citing cases including the concurring opinion of Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 347, 348, 56 S. Ct. 466, 483, 80 L. ed. 688.

In *Watson et al. v. Buck et al.*, 313 U. S. 387, 85 L. ed. 1416, 61 S. Ct. 962 (1941) the Court gave excellent reasons why it should refrain from passing on all contingencies of attempted enforcement of a statute until faced with cases involving particular provisions, as specifically applied to persons who claimed to be injured. The Court said:

> "* * * Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case. * * *"

The judicial power under Article III of the Constitution of the United States extends only to that of deciding actual "cases" or "controversies" that are ripe for judicial determination. It does not extend to that of rendering an advisory opinion or declaratory judgment with respect to hypothetical cases.

> See: *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70, 71 L. ed. 541, 47 S. Ct. 282 (1927);
>
> *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 83 L. ed. 1147, 59 S. Ct. 754 (1939).

See also opinion of Justice Frankfurter in *Coleman v. Miller*, 307 U. S. 433, 83 L. ed. 1385, 59 S. Ct. 972, 122 A. L. R. 695 (1939).

The case at bar involves nothing more than the posing of hypothetical situations,—it poses nothing more than feared invalid applications of the manifold provisions of a constitutional statute. No constitutional right of the appellants has been invaded.

POINT II

THE APPELLANTS ARE PRECLUDED FROM ASSERTING THAT THE FEDERAL GOVERNMENT IN THE NATIONAL LABOR RELATIONS ACT AND RELATED LEGISLATION HAS LAID DOWN A POLICY GOVERNING LABOR RELATIONS AFFECTING INTERSTATE COMMERCE TO THE EXCLUSION OF ANY STATE LEGISLATION DEALING WITH PRECISELY THE SAME SUBJECT AS NO SUCH QUESTION WAS RAISED IN THE COURT BELOW.

In presenting this case to the Supreme Court of the State the appellants conceded the validity of the principle of *Wis. L. R. Bd. v. Fred Rueping L. Co.*, 228 Wis. 473, 279 N. W. 673 (1938), which dealt with the exact point which appellants deal with in POINT I of their argument. That case decided the point adversely to the contention which appellants now make in this Court. It is elementary that any such point, not raised in the Court below, cannot be raised for the first time in this Court. *McGoldrick, etc. v. Compagnie Generale Transatlantique*, 309 U. S. 430, 84 L. ed. 849, 60 S. Ct. 670 (Mar. 25, 1940).

Furthermore the question of whether states may pass "Little Wagner Acts" which have the same objective, have similar provisions and which are alike in structure to the National Labor Relations Act and under such Acts assume jurisdiction of employer unfair labor practice cases, in those situations where the National Board might take jurisdiction if it decided to do so, is not involved in the instant case. There could be no possible merit to the appellants' contention at the opening of the hearing before the Board that the National Labor Relations Board had exclusive jurisdiction. It had no jurisdiction. The National Board

has jurisdiction only with respect to employer unfair labor practices. It has none with respect to employee and third person unfair labor practices. The case does not involve any question of exclusive jurisdiction or any question of conflicting jurisdiction.

POINT III

IN ANY EVENT THE FEDERAL GOVERNMENT IN THE ENACTMENT OF THE NATIONAL LABOR RELATIONS ACT HAS NOT PREEMPTED THE FIELD OF LABOR RELATIONS AFFECTING INTERSTATE COMMERCE TO THE EXCLUSION OF STATE LEGISLATION DEALING WITH PRECISELY THE SAME SUBJECT.

A. The intent of Congress to preclude the exercise by the State of its police power which would be valid if not superseded by federal action must be clearly manifested—all doubts concerning the validity of State "Little Wagner Acts" and the jurisdiction of State boards, as applied to situations where the National Board might conceivably act but has not acted, must be resolved in favor of such State Acts and State Board jurisdicion to act.

It is settled doctrine that "the intention of Congress to exclude states from exercising their police power must be clearly manifested. *Reid v. Colorado*, 187 U. S. 137, 148; *Savage v. Jones*, 225 U. S. 501, 533." Brandeis, J. in *Napier v. Atlantic Coast Line*, 272 U. S. 605, 611 (1926). See also *Mintz v. Baldwin*, 289 U. S. 346, 350 (1932); *Carey v. South Dakota*, 250 U. S. 118, 63 L. ed. 886, 39 S. Ct. 403 (1919); *Kelly v. Washington*, 302 U. S. 1, 82 L. ed. 3, 58 S. Ct. 87 (1937).

1. The nature of the subject matter regulated by the National Labor Relations Act requires an especially clear showing of congressional intent to preempt.

The danger of invalidating State legislation when Congress has not clearly indicated such to be its intention is especially serious in view of the subject matter of the National Labor Relations Act. The subject of labor relations is primarily local in its nature and remains so despite the recent recognition of the power of Congress to regulate some of its incidents.

The mere suggestion of congressional intent to exclude State legislation dealing with the same subject proposes a very startling and extensive broadening of the concept of interstate commerce, one indeed that virtually destroys the police power of the states. If the Congress deemed that the National Labor Relations Act could be made to function effectively as an instrument of peace in the field of labor relations and thus prevent burdens and obstructions to interstate commerce, for like reason it would seem that the legislatures of the States might be of a similar view as to the effectiveness of like State legislation in the exercise of their police powers under the 10th Amendment. After all, preservation of the peace and enforcement of law and order is a primary function of State Government.

> "It cannot have been supposed that the cases deemed by the board so importantly to affect interstate commerce as to warrant intervention or with which the board had time to deal would include all of the cases which the states might need to deal with in the interests of local peace and good order. It cannot have been intended to 'paralyze the efforts of a

state to protect her people against impending calamity and commit the matter to the exclusive discretion of a distant and overworked federal agency."

Wisconsin L. R. Bd. v. Fred Rueping L. Co., 228 Wis. 473, 491, 279 N. W. 673 (1938).

Any concept of the scope of the National Act such as appellants propose involves political and economic issues going to the very essence of the relation between Federal and State governments. The language in the case of *Schecter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837 (1935); *United States v. Butler*, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312 (1936), *Carter v. Carter Coal Co.*, (Guffey-Snyder Coal Act) 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855 (1936), and *Nat'l L. R. Bd. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615 (1937) is electric with the problem. If and when Congress should see fit to declare clearly its intent that the states be ousted from jurisdiction in such cases, it will be time enough for the constitutional issue of the limitation of national powers by states' rights to be fought out. The Congress has not manifested any such intent.

2. The language of the National Act shows no such intent.

Admittedly the exercise of its power by Congress in this case is not such as *necessarily* to exclude the state action under consideration. It would have been easy for Congress to provide clear language that to the extent of the application of the National Act no state action should be valid. See, for example, *Minneapolis, St. Paul & Sault*

Ste. Marie Ry. Co. v. Railroad Comm., 183 Wis. 47, 197 N. W. 352 (1924). The statute in that case, sec. 20a of the Transportation Act of Feb. 28, 1920, ch. 91, 41 Stats. 470, provided as follows:

> "(2) It shall be unlawful for any carrier to issue . . . any evidence of indebtedness . . . even though permitted by the authority creating the carrier corporation . . .
>
> (7) The jurisdiction conferred upon the commission by this section *shall be exclusive and plenary*, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein." (Italics ours)

It was properly held that this language showed an intent to invalidate state legislation requiring approval of the State Railroad Commission in addition to approval by the Federal Interstate Commerce Commission. This conclusion was fortified by a careful examination of the circumstances surrounding the enactment of the federal requirement.

The circumstances surrounding the enactment of the National Labor Relations Act require an especially clear showing of intent by Congress to exclude state legislation. It is reasonable to suppose that in view of the very serious consequences of invalidating such State acts, Congress would have used language leaving no room for doubt. Yet the wording of the National Act does not contain a single express reference to state action.

Section 10 (a) reads as follows:

> "Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engag-

ing in any unfair labor practice (listed in section 8) affecting commerce. *This power shall be exclusive*, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." (Italics ours)

Section 10 (a) must be read in its context. *Carey v. South Dakota*, 250 U. S. 118, 122, 63 L. ed. 886 (1919). It must be taken in conjuction with other sections of the National Act, particularly Sections 14 and 8 (3).

"Sec. 14. Whenever the application of the provisions of Section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, section 707 (a)), as amended from time to time, or of sec. 77B, paragraphs (1) and (m) of the Act approved June 7, 1934, entitled 'An Act to Amend an Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898, and Acts amendatory thereof and supplementary thereto' (48 Stat. 922, pars. (1) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect."

Section 8 (3) provides as follows:

"By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, that nothing in this Act or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from

time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . ."

Section 14 and the proviso in section 8 (3) relate solely to statutes of Congress. When read together with these sections, the purpose of section 10 (a), becomes quite clear, namely, to exclude other federal agencies, judicial or administrative, from acting on the subject of unfair labor practices affecting commerce. *Myers, et al. v. Bethlehem Ship Building Corporation*, 58 S. Ct. 459 (1938), *Newport News Ship Building Corp. v. Schauffler*, 58 S. Ct. 466 (1938).

In the *Myers* case, the question was whether a federal District Court has equity jurisdiction to enjoin the National Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices prohibited by the National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C.A. sec. 151 et seq. In holding that the federal District Court had no such jurisdiction, the court said (at page 463):

"It is true that the Board has jurisdiction only if the complaint concerns interstate or foreign commerce. Unless the Board finds that it does, the complaint must be dismissed. And, if it finds that interstate or foreign commerce is involved, but the Circuit Court of Appeals concludes that such finding was without adequate evidence to support it, or otherwise contrary to law, the Board's petition to enforce it will be dismissed, or the employer's petition to have it set aside will be granted. Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest *exclusive* jurisdic-

tion in the Board and the Circuit Court of Appeals." (Italics ours)

This case illustrates the purpose for which the word "exclusive" was inserted in the National Act, and supports the conclusion that it was not intended to refer to state legislation. By the application of the doctrine "*expressio unius est exclusio alterius*," it would seem to follow that by excluding other federal agencies without mentioning state agencies, Congress intended no limitation on state legislation or action.

Referring to the import of sec. 10 (a) the Wisconsin Court in the *Rueping case*, supra, correctly concluded: (p. 483)

> "* * * This section purports to deal not with the scope of the act, but with the powers and jurisdiction of the National Labor Relations Board with respect to its administration. * * *"

3. The origin, purpose, and scope of the National Act shows no such intent.

Sec. 7 (a), part of the N. I. R. A. (Act of June 16, 1933, 48 Stat. 198) went down with the invalidation of that Act in the *Schecter case*, 295 U. S. 495 (1935). The sole problem under 7 (a) was to prevent a gap, through cooperative legislation and action, even though the National and State acts and agencies might overlap. See Lorwin and Wubnig, Labor Relations Boards (1935) pp. 28-45. In interpreting Sec. 7 (a), the National Labor Board and the old National Labor Relations Board established certain rules to add detail to the broad language of the Act. Some of these rules dealt with

more or less specific practices of employers, which were later translated into the provisions of the present National Labor Relations Act under the description of "unfair labor practices." (Section 8).

Nothing in the debates of Congress concerning the National Labor Relations Act or other official records shows that Congress was concerned with excluding the states from acting. In the first place, there was no State legislation of the same character yet in existence. The earliest of the first five State acts (Mass., N. Y., Pa., Utah, Wis.) was the Utah Act of 1937 (Ch. 55, Session Laws of Utah, 1937). In the second place, it is a matter of common knowledge that the chief concern of lawyers and legislators alike was the power of Congress to act at all in the sphere of labor relations.

> "* * * in enacting the National Labor Relations Act, congress was entering a new and uncharted field, one in which the boundaries of any competency it might have were extremely doubtful. It was already occupied at least in part by state laws passed in exercise of the police power to preserve local peace and good order. What was doubtful at the time of enactment with reference to the boundaries of the power continues to be doubtful. * * *" *Wis. L. R. Bd. v. Fred Rueping L. Co.*, 228 Wis. 473, 279 N. W. 673.

Determination of the scope and extent of the power of Congress is left to individual cases as they arise. *Santa Cruz Packing Co. v. Nat'l. L. R. Bd.*, 303 U. S. 453, 82 L. ed. 954, 58 S. Ct. 656 (1938).

As was said by the Wisconsin Court in the *Rueping case*:

> "It seems to us a violent assumption that in dealing with a subject in which the limitations on its power

were and are so uncertain as to require determination by such a process congress could have intended to exclude state legislation in the field, except so far as it conflicted with the federal act. If it did so intend, then the prediction may safely be made that as a practical matter jurisdictional doubts will for years preclude effective administration either by the state or national governments. * * *"

In the third place, the sole concern of the legislators on the subject of exclusiveness was the elimination of the great variety of *federal labor boards* which had grown up in administering Section 7 (a) of the N.I.R.A. Thus the 74th Congress discussed ways and means to consolidate and further the improvement in industrial relations made under 7 (a) through the machinery of collective bargaining. For example, the statement of Senator Robert F. Wagner, sponsor of the Senate bill (70 Cong. Record, Part 7, P. 7569, 74th Cong. 1st Sess.):

"Weak as it is, the present National Labor Relations Board has been subjected, in addition to the corroding influence of various industrial boards, dealing according to their own lights in the same subject matter, at present from 13 to 15 boards have been established to handle 7 (a) cases, and *over none of these has the national board jurisdiction, either as to fact or as to law.* Since there are now over 100 codes which provide for the establishment of industrial boards, there exists the constant threat that dispersion of authority will transcend all reasonable bounds." (Italics ours).

The same concern with conflicting *federal boards*, and lack of concern over possible overlapping state action, is found in the United States Senate Report (74th Cong. 1st

Sess., Senate Report 573) on the Senate bill (S. 1958), which report was presented on May 2, 1935:

> "Today a wide variety of independent boards, from 13 to 15 in number, are entrusted with the administration of section 7 (a). There are now over a hundred codes which made some provisions for the creation of such boards."

4. The administration of the National Act shows no such intent.

In *Mintz v. Baldwin, Com'r. of Agri. and Markets of New York*, 289 U. S. 346, 77 L. ed. 1245, 53 S. Ct. 611, (1932) involving an alleged conflict between the Cattle Contagious Disease Acts of Congress of 1903 and 1905 (Feb. 2, 1903, 32 Stat. 791, 21 U. S. C., secs. 111, 120-122; March 3, 1905, 33 Stat. 1264, 18 U. S. C., sec. 118, 21 U. S. C., secs. 123-127; both acts amended by the Act of February 7, 1928, 45 Stat. 59)—and an order of the Commissioner of Agriculture and Markets of New York, made pursuant to Secs. 72 and 74 of the New York Agriculture and Markets Law, Mr. Justice Butler, speaking for the Court, stated (p. 351):

> "* * * Much weight is to be given to the practical interpretation of the Act by the Federal Department through its acquiescence in the enforcement of state measures * * *"

In the Board's brief in the *Rueping case* it was stated: (p. 32)

> "The record shows knowledge and complete acquiescence of the National Board in the enforcement of the state Act to suppress appellant's unfair labor

practices. The National Board has been fully informed of the proceedings in this case almost if not quite from their inception. Mr. Philip Levy, then a member of the legal staff of the National Board, represented the latter as an observer at the oral argument in the court below. At no time has the National Board ever indicated opposition to the Wisconsin Board's exercise of jurisdiction in this or any similar case, but its attitude has been quite the contrary."

In the *Rueping case* the Board presented a statistical analysis of the State and Federal Board's cooperation in handling cases which the National Board had jurisdiction to handle had it desired to do so. The Supreme Court of the State takes judicial notice of the records of governmental agencies. *Wis. Power & Light Co. v. Beloit*, 215 Wis. 439, 444, 254 N. W. 119 (1934).

The Board further stated in its brief in that case: (p. 35)

"In addition to the cooperation revealed by the statistical analysis above, there have been repeated conferences between representatives of the state Board and the regional office of the National Board in Milwaukee, and two conferences in Washington, one in April, 1937 and another in November, 1937, between the members of both boards and their legal staffs concerning practical matters of administration. See the reply of Mr. Charles Fahy set forth in the Appellant's Brief, Appendix B, at pp. 121-122. It is not necessary for the court to rely on the statement of counsel for the respondent as to the result of these conferences. The fact is, as shown by the records of both Boards, that the state Board, both before and since those conferences, has frequently exercised jurisdiction over unfair labor practices parallel to and including the

case at bar, *with the knowledge and acquiescence of the National Board.*"

Like cooperation and like acquiescence are shown by the National Board in the administration of the New York Act. *Davega City Radio Incorp. v. N. Y. Labor Bd.*, 281 N. Y. 13, 22 N. E. (2) 145 (1939).

The Wisconsin State Federation of Labor (A.F. of L.) and the New York State Labor Board filed briefs as amici curiae in the Supreme Court of the State of Wisconsin in the *Rueping case*, supporting the position of the State Board in that case.

5. The cases applying the National Act do not disclose any such intention.

We have found no case considering either the scope of the National Act or the scope of the Board's power which has ever even intimidated that the National Act pre-empted the field of labor relations. The following quotation from *Consolidated Edison Co. v. Nat'l. L. R. Bd.*, 305 U. S. 197, 83 L. ed. 126, 127 (1938) is most pertinent:

> "* * * It is manifest that the enactment of this state law (New York Labor Relations Law) could not override the constitutional authority of the Federal Government. The State could not add to or detract from that authority. But it is also true that where the employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference or injury arising from the employers' intrastate activities, the question whether the alleged unfair labor practices do actually threaten

interstate or foreign commerce in a substantial manner is necessarily presented. And in determining that factual question regard should be had to all the existing circumstances including the bearing and effect of any protective action to the same end already taken under state authority. The *justification for the exercise of federal power should clearly appear.* Florida v. United States, 282 U. S. 194, 211, 212, 75 L. ed. 291, 301, 302, 51 S. Ct. 119. But the question in such a case would relate not to the existence of the federal power but *to the propriety of* its exercise on a given state of facts." (Italics ours).

6. The nature of the National Act indicates that it does not exclude the states from the field it covers—circumstantial evidence of congressional intent.

"In the absence of express statement, the Court will look to the nature of the subject matter as evidence of congressional intent," Grant, Scope and Nature of Concurrent Power, 34 Col. L. Rev. 995, 1040 (1934). We now consider this circumstantial evidence of congressional intent.

a. The subject dealt with is one from which Congress by its legislation habitually does not exclude the states.

(1) Labor.

Before the enactment of the National Industrial Recovery Act in 1933, the regulation of labor except in government works, the railroad industry, and the shipping industry (under the admiralty power) was generally in the hands of the states.

In Wisconsin, Title XIII of the Statutes treats of the Regulation of Industry. Most of this title is of long standing. Chapter 101 deals with the structure and functions of the Industrial Commission and imposes "safe place" regulations. Chapter 102 is the Workmen's Compensation Act. Chapter 103, Employment Regulation, includes maximum hours for women and children, as well as the Labor Code of 1931. Chapter 104 is the Minimum Wage Law for women and children. Chapter 105 deals with Employment Agents; Chapter 106 with Master and Apprentices; Chapter 107, with Mining and Smelting; Chapter 108 (created in 1933) with Unemployment Compensation; Chapter 109, with State Inspection.

None of the above chapters or sections, either in their language or administration has ever exempted as a class, manufacturers or employers engaged in interstate commerce, or persons whose industrial practices affect interstate commerce. In each case the legislature has outlined a complete scheme, applicable to all employers within Wisconsin, with a few express exceptions which are easily explainable.

In contrast with the Wisconsin scheme just outlined, up to 1933 national labor legislation had been very piecemeal, except with regard to government work and railroad and maritime transportation. Such legislation as Congress

has passed shows no intent to exclude the states from acting, nor has this Court inferred such an intent from the mere exercise of congressional power. *The chief concern of Congress in the field of employer-employee relations has been with the question of whether Congress itself had the power to act, and not whether the states should be excluded.* Moreover in every case where Congress has attempted to legislate in this field, *this Court has considered the right of the states to act as extremely important, in many cases so important as to require that Congress itself do not act.*

Schechter Poultry Corp. v. U. S., 295 U. S. 495 (1935)

Carter v. Carter Coal Co., 298 U. S. 238 (1935)

R. R. Retirement Board v. Alton Railway Co., 295 U. S. 330, 362 (1934)

The Federal Child Labor Acts, ultimately held unconstitutional (See *Hammer v. Dagenhart*, 247 U. S. 251 (1918) holding Congress could not prohibit the transportation of child-made goods; *Child Labor Tax Cases*, 259 U. S. 20 (1922), holding invalid a tax imposed on goods manufactured by child labor) were never held to exclude state legislation, *though none of them expressly saved state legislation.* On the other hand Congress has deliberately passed legislation in the field of labor relations in aid of state legislation, such as the Hawes-Cooper Act of 1929 (45 U. S. Stat. 1084), permitting states to prohibit the importation of prison-made goods, upheld in *Whitfield v. Ohio*, 297 U. S. 431 (1936); the Ashhurst-Summers Act of 1933 (49 U. S. Stats. 494), prohibiting their shipment to states so prohibiting them, upheld in *Kentucky Whip and Collar Co. v. Illinois Central R. R. Co.*, 299 U. S. 334 (1936);

and the Social Security Act (1936, 49 U. S. Stats. 620) whereby Congress supplements state laws relating to unemployment compensation and old age benefits. *Steward Machine Co. v. Davis*, 301 U. S. 548 (1937). *Helvering v. Davis*, 301 U. S. 619 (1937). Such in general is the pattern of the minimum wages and maximum hours bill.

In this situation Congress enacted the National Labor Relations Act. Constitutional doubts as to its validity were settled by the numerous decisions of this Court in 1937, but in not one of those decisions is there an intimidation that the states are excluded by it from action in the same field. Nor is there the slightest suggestion in the subsequent decisions of this Court applying to the Wisconsin Labor Code, that the National Labor Relations Act has at all detracted from its full operation.

Senn v. Tile Layers Union, 301 U. S. 468 (1937);

Lauf v. E. G. Shinner & Co., 303 U. S. 323, 82 L. ed. 872, 58 S. Ct. 578 (1938).

(2) Trade practices.

It is not only in labor relations that Congress has regulated industry without inferentially curtailing states' rights. The repression of harmful commercial practices has frequently received its attention without limiting the states' freedom to repress the same evils.

A type of business practice which has been the subject of Federal prohibition is competition by unfair methods, to prevent which the Federal Trade Commission was created in 1913. Though later National legislation expressly saved State legislative power with respect to retail price

maintenance, Miller-Tydings Act of August 17, 1937, c. 690, Tit. VIII, 50 Stat. 693, this Federal Trade Commission Act of 1913, like the Sherman Act (which the Miller-Tydings Act amends, 15 U.S.C.A. sec. 1) and the Clayton Act, contains no reference to State legislation in the same field. Federal Trade Commission Act, 38 Stat. 719 (1914), 15 U.S.C. sec. 45.

Whatever doubt existed as to the permissible extent of the operation of State laws laying down a policy *contrary* to the Federal Trade Commission Act, the Act has never been construed to keep the states from regulation of trade practices not in fact conflicting with the federal regulation. That it was wrong in the eyes of the United States to use unfair methods of competition in interstate commerce, did not mean that the states could not make laws concerning the same reprehensible practices and set up special agencies to combat them.

The Federal Trade Commission Act does not "occupy the field" to the exclusion of the states. *Federal Trade Comm. v. Bunte Bros.*, 312 U. S. 349, 85 L. ed. 881, 61 S. Ct. 580 (1941).

There has been much state legislation. Wis. Stat. sec. 100.18-100.22. *Kryl v. Frank Holton & Co.*, 217 Wis. 628 (1935). Handler, *Unfair Competition* (1936) 21 Iowa L. Rev. 175, 229-236. Yet the cases enforcing this legislation do not indicate that the existence of the Federal Trade Commission has the slightest effect in limiting its field of operation.

This is particularly significant because the National Labor Relations Act is nothing but the Trade Commission Act applied to another sort of unfair practice.

"The machinery for the prevention of unfair labor practices affecting commerce follows closely the familiar provisions of the Federal Trade Commission Act, a procedural pattern which has been repeatedly approved as an appropriate and constitutional method for the administration of Federal law." NLRB, First Annual Report, p. 11 (1936).

See also Senate Rep. 573, 74th Cong., 1st Sess. (1935) 14; H. R. Rep. No. 972, 74th Cong., 1st Sess. (1935) 21; and H. R. Rep. No. 1147, same session, 23.

In the same way federal regulation of future trading in grain was held in *Dickson v. Uhlmann Grain Co.*, 288 U. S. 188 (1933), not to imply a prohibition of more vigorous state regulation.

The case of *Mintz v. Baldwin, Com'r. of Agriculture and Markets of New York*, 289 U. S. 346, 77 L. ed. 1245, 53 S. Ct. 611 (1933) involved an alleged conflict between the Cattle Contagious Disease Acts of Congress (Feb. 2, 1903, 32 Stat. 781, 21 U.S.C. secs. 111, 120-122; March 3, 1905, 33 Stat. 1264, 18 U.S.C., sec. 118, 21 U.S.C., secs. 123-127; both acts amended by the Act of Feb. 7, 1928, 45 Stat. 59), and an order of the Commissioner of Agriculture and Markets of New York, defendant, made pursuant to Secs. 72 and 74 of the New York Agriculture and Markets Law. The Federal Act of 1903, which alone raised any doubt as to the validity of the defendant's action, was described by the court as follows: (pp. 350-351)

"* * * It is a measure intended to enable the Secretary to prevent the spread of disease among cattle and other livestock. He is authorized and directed from time to time to establish such rules and regulations concerning interstate transportation from

any place 'where he may have reason to believe such diseases may exist * * * and all rules and regulations shall have the force of law'. 'Whenever any inspector * * * shall issue a certificate showing that such officer had inspected any cattle * * * which were about to be shipped * * * from such locality and had found them free from * * * communicable disease, such animals, so inspected and certified, may be shipped * * * 'without *further inspection or the exaction of fees of any kind*, except such as may at any time be ordered or exacted by the Secretary of Agriculture * * *' Secs. 1; 21 U.S.C. sec. 120, 121." (Italics ours)

The facts giving rise to the legal issue were these (pp. 347-349):

"Defendant, acting under state statutes, made and is enforcing an order to guard against Bang's disease, bovine infectious abortion. The order requires that the cattle imported into New York for such purposes and also the herds from which they come shall be certified to be free from that disease by the chief sanitary official of the state of origin and that each shipment be accompanied by such a certificate.

"Plaintiffs shipped 20 head from Wisconsin for delivery to one Bartlett in New York. The animals were accompanied by a certificate which was sufficient as to them, but there was nothing to show the freedom from Bang's disease of the herd or herds from which they came. For that reason defendant refused to permit them to be delivered, and so plaintiffs were compelled to take them out of New York.

"Plaintiffs brought this suit for a temporary and perpetual injunction to restrain enforcement of the order. Their claim, so far as here material, is that the order is repugnant to the commerce clause because

in conflict with federal statutes relating to interstate transportation of livestock. . . . *The Federal Department of Agriculture, November 15, 1932, by letter to defendant declared that the Department had issued no quarantine or regulations pertaining to Bang's disease and that its policy for the present is to leave the control with the various states.*" (Italics ours)

In dealing with the legal issue, the Court first discussed the validity of defendant's order *in the absence* of *federal legislation* (pp. 349-350):

"The order is an inspection measure. Undoubtedly it was promulgated in good faith and is appropriate for the prevention of further spread of the disease among dairy cattle and to safeguard public health. It cannot be maintained therefore that the order so unnecessarily burdens interstate transportation as to contravene the commerce clause. *Gibbons v. Ogden,* 9 Wheat. 1, 203, 204; *Minnesota Rate Cases,* 230 U. S. 352, 402, 406; *Reid v. Colorado,* 466; *Henderson v. Mayer,* 92 U. S. 259, 268. Unless limited by the exercise of federal authority under the commerce clause, the State has power to make and enforce the order."

Speaking next of the approach to be taken in determining the effect of federal legislation on a subject covered by a state law, Mr. Justice Butler said (p. 351):

"The purpose of Congress to supersede or exclude state action against the ravages of the disease is not lightly to be inferred. The intention so to do must definitely and clearly appear. *Atchison, T. & S. F. Ry. Co. v. Railroad Commission,* 293 U. S. 380, 391; *Carey v. South Dakota,* 250 U. S. 118, 122; *Savage v.*

Jones, 225 U. S. 501, 533; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 623."

The vital part of the opinion, so far as the exact point in issue there as here is concerned, is found in the following language: (p. 351-352)

> "* * * Plaintiffs' cattle were not inspected by, and no certificate was issued under, federal authority. Unless the Act itself operates to prevent the enforcement of the order the suit was rightly dismissed. The express exclusion of state inspection extends only to cases where federal inspection has been made and certificate issued. The clause cannot be read to extend to other cases * * * *Much weight is to be given to the practical interpretation of the Act by the Federal Department through its acquiescence in the enforcement of state measures to suppress Bang's disease.* This case is governed by the principle on which rests the decision in Asbell v. Kansas, 209 U. S. 251. Defendant's order does not conflict with the Act of 1903." (Italics ours)

The order dismissing the bill was affirmed.

The analogy of this case to the problem dealt with by the Court in the *Rueping case* is obvious. That problem is a preempted field problem,—appellants' POINT I.

b. The sort of remedy provided indicates the continuance of State power.

The Naitonal Labor Relations Board has "power to issue" a complaint only when an employee or labor union requests it,—that is, charges the existence of an unfair labor practice affecting commerce. The refusal of the Board

to act is final. The Act confers no private rights or private remedies. The Act is a public Act and the rights enforced are those of the public. *Amalgamated Utilities Workers v. Consolidated Edison Co.*, 309 U. S. 261, 84 L. ed. 738; *Nat'l. Licorice Co. v. Nat'l. L. R. Bd.*, 309 U. S. 350, 84 L. ed. 799, 60 S. Ct. 569 (1940).

Where a statute gives only to the government redress for a wrong, it is unusual to apply the doctrine of "occupation of the field." Where the federal remedy is narrow, the implication of state exclusion is absent. Where the constitution, as in *In re Debs*, 158 U. S. 564 (1895), or the statutes, as in the Sherman Act (1890) prior to the Clayton Act (1914), empower the *United States* to obtain equitable or criminal redress, but grant no rights (or only damages) to others, there is little ground for an implied exclusion of state legislation for the protection of the interests of the *State* or of *individuals* aggrieved by the very acts which the Federal law, in its limited way, seeks to suppress.

The very narrowness of the Federal remedy provided by the National Labor Relations Act is a reason for holding that, by the enactment of it, Congress did not intend to preempt the field. In the first place, when complaint is made to the Board, the Board has a discretion as to whether it will proceed. Its discretion will be exercised in a manner dependent upon whether it finds upon investigation that interstate commerce is substantially affected. There can be no rigid mathematical formula for determining such a question. The Board is given the widest kind of discretion. Certainly, until the Board determines that interstate commerce is substantially affected or indicates in some manner that it will assume jurisdiction, State acts aimed

at preserving industrial peace through similar agencies must have full scope for operation. The language of the Wisconsin Court in the *Rueping case* quoted is most pertinent.

> "* * * The fact that under the National Labor Relations Act the board initiates all proceedings to administer or to enforce the act should also be considered in this connection. It cannot have been supposed that the cases deemed by the board so importantly to affect interstate commerce as to warrant intervention or with which the board had time to deal would include all of the cases which the states might need to deal with in the interests of local peace and good order. It cannot have been intended to 'paralyze the efforts of a state to protect her people against impending calamity' and commit the matter to the exclusive discretion of a distant and overworked federal agency. * * *"

If the National Labor Relations Act really "occupies the field" of labor relations then it would seem that the decision of this Court in *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 81 L. ed. 1229, 57 S. Ct. 857 and *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 82 L. ed. 872, 58 S. Ct. 578, were wrong.

These cases were decided by this Court after it had sustained the National Labor Relations Act in *National Labor Relations Board v. Jones & Laughlin S. Corp.*, 301 U. S. 1, 81 L. ed. 893 (1937) and the other cases that came down at the time these historic decisions were rendered. For "occupying the field" means not the exclusion of like remedies administered by like administrative agencies, it means exclusion of all State *regulation* of the field of interest. It would be difficult to hold that the creation of the National Labor Relations Act vetoes State legislation

of the same kind without at the same time holding much of the substantive State laws with respect to the rights of labor vetoed by congressional enactment of the National Labor Relations Act. In the *Shinners* and *Senn cases*, above cited, this Court looked to the Wisconsin law for the substantive rights of labor.

7. The National Labor Relations Act does not exclude the States from the field of labor relations "affecting commerce" until the National Labor Relations Board has entered an order concerning practices of a particular employer.

If the National Labor Relations Act is to be applied to a particular employer, the National Labor Relations Board must make a finding that his labor practices, alleged to be unfair "substantially affect interstate commerce". The National Labor Relations Board is the exclusive judge (within constitutional bounds) as to whether interstate commerce is sufficiently affected to warrant any action by it—just as the Interstate Commerce Commission is the exclusive judge (within constitutional bounds) of how far interstate railroad rates should be controlled by it because of their affect upon interstate commerce. As this Court pointed out in *Santa Cruz Packing Co. v. Nat'l. L. R. Bd.*, 303 U. S. 453, 82 L. ed. 954, 58 S. Ct. 656 (1938), the constitutional question of whether the practice *affects commerce* so as to *permit* the National Board to exercise jurisdiction, is a question of degree, just like the question "met whenever the Interstate Commerce Commission is required to find whether an intrastate rate or practice of an interstate carrier causes an undue and unreasonable discrimina-

tion against interstate or foreign commerce" (citing the *Shreveport Case*, 234 U. S. 342, 351). It is also a question of degree whether the particular practice sufficiently affects commerce to *interest the National Labor Relations Board in exercising its jurisdiction.* And this is a question, like others under this and similar acts, calling for the expert judgment of the special agency appointed to carry out the act, a question on which the courts will not pass. *Great Northern R. R. Co. v. Merchants Elevator Co.*, 259 U. S. 285 (1922); *Board v. Great Northern Ry Co.*, 281 U. S. 412 (1929); *State ex rel. Superior v. Duluth St. Ry. Co.*, 153 Wis. 650 (1913); *Agwilines Inc. v. N. L. R. B.*, 87 Fed. (2d) 146, 150 (1936).

Any order entered by a State Board remains as fully operative as the State's authority over the "intrastate rate or practice of an interstate carrier" at least until the National Labor Relations Board has found that a particular employer's intrastate labor practice so affects interstate commerce that the National Labor Relations Board should act. *Board of R. R. Commerce v. Great Northern Ry.*, 281 U. S. 412, 74 L. ed. 936, 50 S. Ct. 391 (1930); Interstate Commerce Commission Control of Intrastate Rates (1934) 44 Yale L. J. 133.

Board v. Great Northern Ry., supra, is important in relation to this problem. It deals with intrastate railroad rates, like the earlier Minnesota Rate case and the Shreveport case. In the *Board v. Great Northern Ry. case*, supra, the railway sought to enjoin the Board of Railroad Commissioners of North Dakota from enforcing its order prescribing certain intrastate class rates, on the ground that there was then pending before the Interstate Commerce Commission "the question whether the intrastate rates, as

thus prescribed, cause an undue or unreasonable discrimination against interstate commerce in violation of Section 13 of the Interstate Commerce Act." The U. S. District Court granted an interlocutory injunction. On appeal by the state commission, this Court reversed the order of the District Court and directed the dismissal of the bill of complaint. In its opinion the Court, speaking of the considerations invoked in the *Minnesota Rate* case said (at pp. 421-422):

> "* * * Dealing with the interblending of operations in the conduct of interstate and local business by interstate carriers, the Court said that these considerations were for the practical judgment of Congress, and that if adequate regulation of interstate rates could not be maintained without imposing requirements as to such intrastate rates as substantially affected the former, it was for Congress, within the limits of its constitutional authority, over interstate commerce, to determine the measure of the regulation it should apply. *It was not the function of the Court to provide a more comprehensive scheme of regulation than Congress had decided upon, nor, in the absence of Federal action, to deny effect to the laws of the State enacted within the field which it was entitled to occupy until its authority was limited through the exertion by Congress of its paramount constitutional power.* On the assumption that Section 3 of the Interstate Commerce Act should be construed as applicable to unreasonable discriminations between localities in different States, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rate exclusively, the Court was of the opinion that the controlling principle governing the enforcement of the act should be applied to such cases and that *the question of the existence*

of such a discrimination would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts.

Further, at page 424, the Court said, still referring to the *Minnesota Rate* case:

> "The grounds for invoking this principle of preliminary resort to the Interstate Commerce Commission are even stronger when the effort is made to invalidate intrastate rates upon the ground of unjust discrimination against interstate commerce. Not only are the questions as to the effect of intrastate rates upon interstate rates quite as intricate as those relating to discrimination in interstate rates, not only is there at least an equal need for the comprehensive, expert and continuous study of the Interstate Commerce Commission, and for the uniformity obtainable only through its action, *but in addition there is involved a prospective interference with State action within its normal field, in relation to the domestic concern of transportation exclusively intrastate.* The Court found no warrant for the contention that Congress in enacting the Interstate Commerce Act intended that there should be such an interference before the fact of unjust discrimination had been established by competent inquiry on the part of the administrative authority to which Congress had entrusted the solution of that class of questions." (Italics ours)

The court held, p. 430, that "the power of the State to establish rates for its internal commerce" was not suspended by the mere existence of the Federal Act but was subject to suspension only upon a finding by the Interstate Commerce Commission, after a full hearing, that an unjust discrimination was created.

The fact situations and the practical implications of this case in relation to the power of State Boards to act with respect to labor relations until the National Board has acted, are so analogous as to make the quotations especially pertinent. This case alone would be ample authority to support an order of the State Board made at any time before the National Board has issued an order concerning the same practice. Certainly there can be no reasonable doubt that where the jurisdiction of the National Board has not even been invoked, a State Board may act.

Closely following on this intrastate railroad rate case are two cases sustaining the power of State commissions to fix the method of accounting for depreciation of telephone properties within a state, though since 1906 the Federal Regulatory Agency, first the Interstate Commerce, later the Federal Communications Commission, was authorized to require uniform accounting by telephone companies: *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 75 L. ed. 255, 51 S. Ct. 65 (1930); *Northwestern Bell Tel. Co. v. Nebraska State Ry. Com.*, 297 U. S. 471, 80 L. ed. 810, 56 S. Ct. 536 (1936). Here the Court decided that State power is not ousted by the Federal government's potential entry into the field of depreciation accounting.

After the National Commission has acted, the state authority is ousted because the National Act makes it unlawful " to keep any other accounts, records, or memoranda, than those prescribed or approved by the commission." ICA secs. 20 (5), 49 U. S. C. sec. 20 (5). Communications Act 1934, 40 Stat. 1078, sec. 220 (g), 47 U. S. C. A. sec. 220 (g). The national rule thus being exclusive, a state system differing from it would necessarily be in ac-

tual conflict with the national rules. (But there is no reason to think that the State could not require the companies to observe the nationally prescribed rules, subject to state penalty.) Where no actual conflict exists, because the National Commission has not yet required anything, the state requirement remains in full force. In the *Northwestern Bell Telephone* case the court said (p. 478):

> "Both the language of the statute already quoted, and the nature of its subject-matter indicate that it contemplated no restriction of state control over depreciation rates until the Interstate Commerce Commission had prescribed its own rates. State Commissions were not deprived of power to fix rates for intrastate telephone service, in determining which rates of depreciation chargeable to operating expenses play an important part. See Lindheimer v. Illinois Bell Telephone Co., 292 U. S. 151, 54 S. Ct. 658, 78 L. ed. 1182. The statute did not envisage an immediate adoption of depreciation rates by the Interstate Commerce Commission. A long period might elapse, as the event has shown, before the commission would be prepared to act. It cannot be supposed that Congress intended by the amendment to Section 20 (5) to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates.
>
> "* * * Section 20 (5) cannot be read as authorizing the Interstate Commerce Commission to supplant state power to regulate depreciation rates of telephone companies except by prescribing a rate administratively determined by the commission itself. A direction that the commission, as soon as practicable, prescribe depreciation rates, is hardly to be read as authority to permit the telephone companies to fix the rates for

themselves in defiance of state power. The doubtful constitutionality of the statute, if so construed, precludes our acceptance of such a construction."

Of like tenor and effect is *McDonald v. Thompson et al.*, 305 U. S. 263, 83 L. ed. 164, 59 S. Ct. 176 (1938), in which case it was held that a common carrier by motor vehicle who had been using Texas highways in interstate transportation since before the passage of the Federal Motor Carrier Act was not entitled to continue operations under the proviso of the Act relating to carriers "in bona fide operation" over routes for which application for a certificate of public convenience and necessity is made to the Interstate Commerce Commission, where the carrier's operations had been without authority of the Texas Railroad Commission. The case stands for the proposition that until the Federal Commission acts, the State laws are operative; that the passage of the Motor Carrier Act did not in and of itself deprive the states of authority and that conflict with State authority can arise only if the Federal agency has been appealed to and acted.

In *H. P. Welch Co. v. State of New Hampshire*, 306 U. S. 79, 83 L. ed. 500, 59 S. Ct. 438 (1939), a New Hampshire statute prohibited operation of motor vehicles for specified transportation by drivers who had been continuously on duty for more than twelve hours. It was urged that the State statute had been superseded by the Federal Motor Carrier Act prior to the Interstate Commerce Commission prescribing regulations. It was held that it could not be inferred that Congress, in enacting the statute under the commerce clause, intended to supersede any State safety measure prior to the effective date of a Federal measure or regulation of the Interstate Commerce Commission suit-

able to replace it, and that purpose to replace the local law by the mere enactment of the Federal Motor Carrier Act would have to be definitely expressed. Her again, the mere grant of power to a Federal agency to act does not constitute action by the government supplanting State authority until the administrative body has acted. See also: *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346, 83 L. ed. 752, 59 S. Ct. 528 (1939), and *Eicholz v. Public Service Commission*, 306 U. S. 268, 622, 83 L. ed. 642, 59 S. Ct. 532 (1939).

In the last cited case, Eicholz had applied for a permit from the Interstate Commerce Commission and that application was still pending at the time of the hearing below. The State Public Service Commission of Missouri had revoked his permit as an interstate carrier because he was using his interstate license for intrastate business contrary to the provisions of the Missouri statutes. It was held that the action of the Missouri Commission was not in excess of State authority at least until the Interstate Commerce Commission acted. It will be noted that the Wisconsin Supreme Court in its decision in the case at bar follows the exact rationale of these cases.

All of the above cases involve state action with respect to matters of local concern which are well within the police power of the state. It would be difficult to conceive of any matter of greater local concern than the maintenance of law and order in relation to the peaceful operation of industry. When the Congress enacted the National Labor Relations Act its competency to enter the field at all was extremely doubtful. The boundaries of the jurisdiction of the National Board were completely unknown, and can be determined only by the process of inclusion and exclusion

as individual cases arise. *Santa Cruz Packing Co. v. Nat'l. L. R. Bd.*, 303 U. S. 453, 82 L. ed. 954, 58 S. Ct. 656, 1938).

As was stated by the Wisconsin Court in the *Rueping case*: (p. 491)

> "It seems to us a violent assumption that in dealing with a subject in which the limitations on its power were and are so uncertain as to require determination by such a process congress could have intended to exclude state legislation in the field, except so far as it conflicted with the federal act. * * *"

Exclusion of state legislation in the field would have resulted in a no man's land for years to come, while the extent of the jurisdiction of the National Board was being evolved by the gradual process of inclusion and exclusion in individual cases as they might arise. As stated by the Wisconsin Court in the *Rueping case* (p. 491)

> "* * * If it [the Congress] did so intend, then the prediction may safely be made that as a practical matter jurisdictional doubts will for years preclude effective administration either by the state or national governments. * * *"

No one can deny the force of those observations.

8. The pattern of all recent federal legislation and executive action reveals a general purpose to cooperate with, rather than to supplant, the states in socio-economic legislation.

Under modern socio-economic conditions the need for national action in certain fields is now generally admitted. Hence Congress is extending its powers into fields hitherto

left to exclusive regulation by the states. However, as we have shown, it does not follow that the entry of Congress necessarily excludes the states, nor has Congress shown such an intent. A study of the recent trend in federal legislation proves that we are living in an era of federal-state cooperation rather than mutual exclusiveness. See Koenig, Federal and State Cooperation under the Constitution, 36 Mich. L. Rev. 752 (1938).

This cooperation has taken various forms, including: *First*, federal grants in aid, Koenig, supra, pp. 756-759, as by the Social Security Act, 49 Stat. 620 (1935), 42 U. S. C. (Supp. II, 1936), c. 7; and the Wagner-Peyser Act, 48 Stat. L. 113 (1933), 29 U. S. C. (1934) secs. 49-491, establishing a nation-wide United States Employment Service. *Second*, supplementary legislation, Koenig, *supra*, pp. 759-761, such as the Hawes-Cooper Act of 1929, 45 Stat. 1084, 49 U. S. C. (1934) sec. 60, allowing the states to prohibit the sale in the original package of convict-made goods shipped in interstate commerce, upheld in *Whitfield v. Ohio*, 297 U. S. 431 (1936); the Ashhurst-Sumners Act, 49 Stat. 494 (1935), 49 U. S. C. (Supp. II, 1936), sec. 61, prohibiting the transportation of convict-made goods intended for delivery and sale in another state where the local laws forbid such sale, upheld in *Kentucky Whip and Collar Co. v. Illinois Central R. R.*, 299 U. S. 334 (1937). Other instances of supplementary legislation include the repression of lotteries, 28 Stat. 963, (1895) 18 U. S. C. (1934) sec. 387; the liquor traffic, 26 Stat. 313 (1890), 37 Stat. 699, 27 U. S. C. (1934) secs. 121-122; traffic in game taken in violation of state laws, 31 Stat. 188 (1900), 35 Stat. 1137 (1909), 18 U. S. C. (1934), sec. 392; various criminal activities, such as the white slave traffic, 36 Stat. 825 (1910), 18 U. S. C. (1934), sec. 399, up-

held in *Hoke v. U. S.*, 227 U. S. 308 (1913); traffic in stolen motor vehicles, 41 Stat. 324 (1919), 18 U. S. C. (1934), sec. 408, upheld in *Brooks v. U. S.*, 267 U. S. 432 (1925); kidnapping, 47 Stat. 326 (1932), 48 Stat. 781 (1934), 18 U. S. C. (1934) sec. 408a; racketeering, 48 Stat. 979 (1934), 18 U. S. C. (1934), sec. 420a. The Act of June 24, 1936, 49 Stat. 1899, U. S. C. A., sec. 407a, prohibiting interstate transportation of strike-breakers, is of this type. In addition there is the Fair Labor Standard Act of 1938, 52 Stat. 1060, 29 U. S. C. A. Sec. 201, et seq., 29 U. S. C. Sec. 201, barring from interstate commerce certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to the standards set up by the Act, upheld by this Court in *United States v. Darby*, 312 U. S. 100, 85 L. ed. 611, 61 S. Ct. 451, (1941) and in *Opp Cotton Mills, Inc., et al. v. Adm'sr. of the Wage & Hour Div., etc.*, 312 U. S. 126, 85 L. ed. 627, 61 S. Ct. 524 (1941). *Third*, legislation or joint resolutions consenting to or authorizing interstate compacts, Koenig, *supra*, pp. 761-768, especially 761, n. 45, 17. Of the 56 of such acts or joint resolutions passed since 1789, seventeen were adopted in the period 1935-1938. *Fourth*, encouraging reciprocal legislation, *ibid*, pp. 768-769. *Fifth*, the establishment of regional planning agencies such as the Tennessee Valley Authority, *ibid*, pp. 769-771. *Sixth*, joint conferences, *ibid*, pp. 771-772. And *Seventh*, the utilization of state administrative agencies, *ibid*, pp. 772-784.

This last cooperative technique has been applied to the apprehension of fugitives from justice, 18 U. S. C. (1934), sec. 662; the enforcement of the National Prohibition Act; public health administration; the enforcement of the Plant Quarantine Act, 37 Stat. 316 (1912), 7 U. S. C. (1934), sec.

156; the Public Utilities Act of 1935, 49 Stat. 803 (1935), 15 U. S. C. (Supp. II, 1936), sec. 79 et seq; the Pure Food and Drug Act of 1906; the Lacey Act, 31 Stat. 187 (1900), 16 U. S. C. (1934), sec. 701; the Migratory Bird Treaty Act, 40 Stat. 755 (1918), 16 U. S. C. (1934), secs. 703-711, deputizing state wardens to supervise migratory game; the Transportation Act of 1920, 41 Stat. 484 (1920), 49 U. S. C. (1934), sec. 13 (3), "ordering the Interstate Commerce Commission to notify interested states of all proceedings bringing into issue any rate, regulation, or practice made or imposed by state authorities;" permitting the Commission "to confer with state authorities concerning the 'relationship between rate structures and practices' of carriers subject to state and federal regulation, and, under rules to be prescribed by it, to hold joint hearings 'on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission;'" finally, to " 'avail itself of the cooperation, services, records and facilities of such State authorities in the enforcement of any provision of this act.'" Koenig, *supra*, at pp. 776-777; the Motor Carrier Act, 49 Stat. 543 (1935), 49 U. S. C. (Supp. II, 1936), secs. 301-327, authorizing the Interstate Commerce Commission to utilize "joint boards," 49 Stat. 549, sec. 205 (b), (c) (1935), 49 U. S. C. (Supp. II, 1936), sec. 305 (b), (c); the Selective Service Act, 40 Stat. L. 76 at 79 (1917), authorizing the President to create local supervisory draft boards; the Civilian Conservation Corps administration, Koenig, *supra*, at page 781; the N. I. R. A., 48 Stat. 195, tit. I, sec. 2 (a) (1933), granting the President authority to utilize state officers and employees, with Wisconsin (L. 1933, c. 476, Wis. Stats. (1935) secs. 110.01 to 110.10) and twelve other states responding

with statutes permitting cooperation with the federal government in this manner, Koenig, *supra*, page 781, n. 118.

The above review illustrates convincingly the efforts being made by the executive and legislative departments of federal and state governments to blend their powers for the common welfare of state and nation. This Court has shown no disposition to adopt an attitude out of harmony with the other departments of government.

9. All of the recent decisions of this Court show a disposition to interpret the national constitution and statutes to protect the State's legislative powers against nullification by implication from congressional action or inaction—in view of the expansion of exercise of federal power, this has been a necessary trend if the federal system under the constitution is to be maintained.

As a result of the recent broadening of the scope of congressional regulation of intrastate activities formerly controlled exclusively by the states, there is an ever increasing fear of impairment of State sovereignty. This Court has repeatedly warned of such a result in recent cases. In the case of *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936), holding the Guffey-Snyder Coal Act, 49 Stat. 991, invalid, the court stated (at pp. 295-296):

> "The determination of the Framers Convention and the ratifying conventions to preserve complete and unimpaired state self-government in all matters not committed to the general government is one of the plainest facts which emerge from the history of their deliberations. And adherence to that determination is incumbent equally upon the federal government and the states. State powers can neither be appropriated on

the one hand nor abdicated on the other. . . . Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified."

In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), the court warned of the danger of pushing the authority of the federal government to such an extreme as "to obliterate the distinction between what is national and what is local and create a completely centralized government." See the opinion of the court, at pp. 30, 37.

In *Kelly v. Washington*, 58 S. Ct. 87 (1937) the Court reversed a decision of the Washington Supreme Court holding a state statute relating to the inspection and regulation of vessels inoperative because impinging on a field occupied by the United States. This case is of particular importance for several reasons. First, it contains a most comprehensive and authoritative discussion of the subject of implied exclusion of state legislation by congressional silence or action. Second, it was decided only after reargument, in which the solicitor general participated for the United States, as *amicus curiae*, by special leave of court, the latter, after the original hearing, having requested the attorney general to present the views of the

government upon the question "whether the state act or the action of the officers of the state thereunder conflicts with the authority of the United States or with the action of its officers under the acts of Congress"; 58 S. Ct. 87, 89; third, the state supreme court had held its own statute invalid "if applied to the navigable waters over which the federal government has control." 186 Wash. 589, 596, 59 P. (2d) 373, 376.

This Court took a more favorable view of the state legislation than the State Supreme Court itself, and reversed the latter's decision. The court said (at pp. 91-2):

> "The next question is whether the federal statutes are to be construed as implying a prohibition of inspection by state authorities of hull and machinery to insure safety and determine seaworthiness in the case of vessels, which in this respect lie outside the federal requirements.
>
> "The state court took the view that Congress had *occupied the field* and that no room was left for state action in relation to vessels plying on navigable waters within the control of the federal government. 186 Wash. 589, 593, 596, 59 P. (2d) 373. And this is the argument pressed by respondents and the Solicitor General.
>
> "This argument, invoking a familiar principle, would be unnecessary and inapposite *if there were a direct conflict with an express regulation of Congress acting within its province.* The argument presupposes the absence of a conflict of that character. The argument is also unnecessary and inapposite if the subject is one demanding *uniformity of regulation* so that state action is altogether inadmissable in the absence of federal action. In that class of cases the Constitution itself occupies the field even if there is no fed-

eral legislation. The argument is appropriately addressed to those cases where States may act in the absence of federal action but where there has been federal action governing the same subject."

". . . The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'

"When the state is seeking to prevent the operation of unsafe and unseaworthy vessels in going to and from its ports, it is exercising a protective power akin to that which enables the state to exclude diseased persons, animals, and plants. These are not proper subjects of commerce, and an unsafe and unseaworthy vessel is not a proper instrumentality of commerce. When the state is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the state of the power which it would otherwise possess."

The state law was upheld, except for certain structural requirements for equipment moving from state to state, which the court held to offend against the rule (inherent in the commerce clause, regardless of national legislation) prohibiting any state regulation interfering with the uniformity indispensable to the carrying on of interstate commerce.

Structural requirements that were an impediment to road-traveling commerce, as customarily conducted, did not lead to the invalidation of the laws of South Carolina attacked in *South Carolina Highway Dept. v. Barnwell Bros.*, 57 S. Ct. 510 (1938). Though Congress had enacted

the Federal Motor Carrier Act, 49 Stat. 546 (1935), 49 U. S. C. A. sec. 304, its coverage was so different from the weight and size limitations imposed on vehicles by the state law that it was not even contended that Congress had occupied the field to the exclusion of the latter. The contention was simply that the commerce clause itself invalidated the state law. The court said (at p. 514):

> "But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might adopt, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intra-state. Few subjects of state regulation are so peculiarly of local concern as is the use of state highways." *South Carolina Highway Dept. v. Barnwell Bros.*, 58 S. Ct. 510, 514 (1938)

See also: *Chicago Tile & Trust Co. v. Forty-one Thirty-Corp.*, 302 U. S. 120, 82 L. ed. 147, 58 S. Ct. 125, 128 (1937), upholding an Illinois statute claimed to be excluded by the Federal Bankruptcy Act; *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, 215 (1937), involving the consent of the West Virginia legislature to the acquisition of certain lands by the United States; *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546 (1938), sustaining a state tax on gross receipts derived from the sale of advertising space in interstate publications; *Helvering v. Therrell*, 303 U. S. 218, 82 L. ed. 758, 58 S. Ct. 539, 542 (1938), upholding a federal tax; *Duckworth v. State of Arkansas*, — U. S. —, — L. ed. —, 62 S. Ct. 311 (decided Dec. 15, 1941), upholding a pro-

vision of the Arkansas statutes which made it unlawful for any person to ship into the state any distilled spirits without first having obtained a permit from the State Commissioner of Revenue; *Federal Trade Comm. v. Bunte Bros.*, 312 U. S. 349, 85 L. ed. 881, 61 S. Ct. 580 (Feb. 17, 1941), setting aside an order of the Federal Trade Commission commanding an Illinois candy manufacturer engaged in distributing his products in Illinois in "break and take packages" which makes the amount the purchaser receives dependent upon chance, to cease and desist from such practices; *People of State of Calif. v. Thompson*, 313 U. S. 109, 85 L. ed. 1219, 61 S. Ct. 930 (Apr. 28, 1941), upholding a California statute requiring every transportation agent to procure a license from the State Railroad Commission, to pay a license fee and file a bond; *McDonald v. Thompson et al.*, 305 U. S. 263, 83 L. ed. 164, 59 S. Ct. 176 (1938), upholding state action with respect to a common carrier by motor vehicle engaged in interstate transportation until the Federal agency has acted; *Townsend v. Yeomans*, 301 U. S. 441, 81 L. ed. 1210, 57 S. Ct. 842 (May 24, 1937), upholding Georgia legislation prescribing maximum charges for services of tobacco warehousemen; *H. P. Welch Co. v. State of New Hampshire*, 306 U. S. 79, 83 L. ed. 500, 59 S. Ct. 438 (1939), upholding a New Hampshire statute prohibiting operation of motor vehicles for specified transportation by drivers who had been continuously on duty for more than twelve hours up to a point where the Federal agency has acted; *Eichholz v. Public Service Comm.*, 308 U. S. 268, 622, 83 L. ed. 642, 59 S. Ct. 532 (1939), holding that the authority of the Public Service Commission of the State of Missouri to revoke a motor carrier's interstate permit in enforcing traffic regulations

was not superseded by the Federal Motor Carrier Act where, at time of revocation of the permit, the Interstate Commerce Commission had not acted upon the carrier's application for a permit under the Federal Act; *Milk Control Board v. Eisenberg Farm Products,* 306 U. S. 346, 83 L. ed. 752, 59 S. Ct. 528 (1939), holding a Pennsylvania statute creating a milk control board with authority to regulate the milk industry; fix minimum prices to be paid by dealers; requiring dealers to obtain licenses and keep certain records, as applied to a group which operated a receiving plant wherein milk was cooled before shipment to another state for sale, was not invalid as a burden on "interstate commerce"; and *Mauer et al. v. Hamilton etc.,* 309 U. S. 598, 84 L. ed. 970, 60 S. Ct. 726 (1940), holding a Pennsylvania statute prohibiting the operation upon Pennsylvania highways of any motor vehicle carrying any other vehicle over the head of the operator of the carrier vehicle to be valid state legislation and not in conflict with the Motor Vehicle Carrier Act of 1935.

The danger of anticipating the intent of Congress, and thereby engaging in judicial legislation, is illustrated by the first *Wheeilng Bridge* case *(Pennsylvania v. Wheeling and Belmont Bridge Co.,* 13 How. 518, 592 (1852)) involving conflicting claims arising under the Federal Coasting Licensing Act and certain Virginia statutes authorizing the maintenance of a bridge over the Ohio River. This Court held in May, 1852, that the bridge was an unlawful structure, because the Act authorizing it was in conflict with the federal law. Chief Justice Taney, dissenting, stated (at p. 592):

> "[Congress] has better means . . . of obtaining information, than the narrow scope of judicial proceed-

> ings can afford. It may adopt regulations by which courts of justice may be guided in an inquiry like this with some degree of certainty, instead of leaving them to the undefined discretion which must now be exercised in every case that may be brought before us, without being able to lay down any certain rule, by which this discretion may be limited. It is too near the confines of legislation; and I think the court ought not to assume it."

The Chief Justice's criticism of judicial guesswork was shown to be justified when the bridge in question was declared a lawful structure by the Act of Congress of August 31, 1852, sec. 6, c. 111, 10 Stat. 110, 112, which was held constitutional in *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421 (1856).

So the Webb-Kenyon Act, 37 Stat. 699 (1913), 27 U. S. C. sec. 122, was the answer of Congress to *Louisville & Nashville R. Co. v. Cook Brewing Co.*, 223 U. S. 70 (1912) and earlier cases which construed the Wilson Act, 26 Stat. 313, to the disadvantage of state legislation; while the ultimate answer was amendment of the constitution itself so as to free the states even more completely from negative implications not only of congressional legislation but of the commerce clause itself. Amendment XVIII Sec. 2, *U. S. v. Lanza*, 260 U. S. 377 (1922). Amendment XXI Sec. 2, *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59 (1936).

Oregon-Washington R. & N. Co. v. Washington, 270 U. S. 87 (1926), was in like manner overruled by Congress within a few weeks. 44 Stat. 250 (1926), 7 U.S.C. sec. 161.

In *Hines v. Davidowitz*, 312 U. S. 52, 85 L. ed. 366, 61 S. Ct. 399, 408, it was observed by Chief Justice Stone in the dissent in said case:

"At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted. Cf. Graves v. O'Keefe, 306 U. S. 466, 479, 480, 487, 59 S. Ct. 595, 597, 598, 601, 83 L. Ed. 927, 120 A.L.R. 1466. The Judiciary of the United States should not assume to strike down a state law which is immediately concerned with the social order and safety of its people unless the statute plainly and palpably violates some right granted or secured to the national government by the Constitution or similarly encroaches upon the exercise of some authority delegated to the United States for the attainment of objects of national concern."

This Court, in its decisions, has repeatedly recognized the vital importance of not despoiling the states of their powers by any implied congressional intent to preempt the field. The Court divided in the case above cited because of the very close and intimate relationship of the subject dealt with by the State legislation (registration and regulation of aliens) with that of the exclusive power of Congress in international affairs. The State legislation was pregnant with possible repercussions in the field of international diplomacy—repercussions Congress had deemed it wise to avoid dealing with matters reserved exclusively to it and with respect to which the states have no power even in the absence of federal action.

The dissimilarity between the subject matter of the Pennsylvania legislation with respect to aliens and state regulation with respect to employment relations and the significance of congressional preemption in the one field, as compared with congressional preemption in the other with respect to despoiling the states of their reserve powers under the 10th Amendment to Constitution of the United States is so perfectly apparent as to need no exposition.

The opinion of the Wisconsin Supreme Court, written by Justice Wickhem in *Wisconsin Labor Relations Board v. Fred Rueping L. Co.* (1938) 228 Wis. 473, 279 N. W. 673, is a masterful analysis of the preempted field question as is the opinion of the Court of Appeals of the State of New York in *Davega City Radio Incorporated v. State Labor Relations Board*, 281 N. Y. 13, 22 N. E. (2) 145. Both decisions hold that the Congress did not intend to preempt the field of labor relations by the enactment of the National Labor Relations Act. The appellants cite no decisions to the contrary. The decisions are so essentially sound in analysis that the appellants did not even challenge their soundness in the Court below. Their soundness was conceded. See Page 45 this brief.

B. The only criteria which appellants advance in support of their preempted field argument is that of the Congress having "occupied the field" and dealt with the "same subject"—the weakest kind of criteria and recognized as meaningless.

Opposed to the force and logic of all criteria of congressional intent above set forth, the appellants urge a congressional intent to preempt the field of labor relations by resort to the formula of "occupied the field" and "same subject". Both criteria are obviously the weakest kind of criteria and are becoming recognized as meaningless. "Occupied the field" begs the whole question. Every time Congress enacts legislation it occupies some field. The question is whether the Congress intended to occupy the field exclusively. Any recognition of "occupied the field" or "same subject" as infallible tests of congressional intent or as even persuasive tests would have resulted in different results in all of the numerous cases heretofore cited where Congress has "occupied the field" and legislated with respect to the "same subject". Thus in the dissenting opinion written by Chief Justice Stone in *Hines v. Davidowitz*, 312 U. S. 52, 61 Supreme Court 399, 410 it is stated:

> "Little aid can be derived from the vague and illusory but often repeated formula that Congress 'by occupying the field' has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history."

Further, no cases are cited in support of appellant's position except (1) *Hines v. Davidowitz, supra*—clearly distinguishable, (2) National Labor Relations Board cases which do not remotely support the position taken, and (3) Railroad cases. The inapplicability of railroad cases such as are relied upon was commented upon by the Wisconsin Court in the *Rueping* decision and by this Court in *Federal Trade Commission v. Bunte Brothers*, 312 U. S. 349, 61 Supreme Court 580, 85 L. ed. 881 (1941):

> "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business. The Interstate Commerce Act and the Federal Trade Commission Act are widely disparate in their historic settings, in the enterprises which they affect, in the range of control they exercise, and in the relation of these controls to the functioning of the federal system. . . . There is the widest difference in practical operation between the control over local traffic intimately connected with interstate traffic and the regulatory authority here asserted. Unlike the relatively precise situation presented by rate discrimination, "unfair competition" was designed by Congress as a flexible concept with evolving content. Federal Trade Comm. v. R. F. Keppel & Bro., supra, at pages 311, 312 of 291 U. S., at pages 425, 426 of 54 S. Ct., 78 L. Ed. 814. It touches the greatest variety of unrelated activities. The Trade Commission in its Report for 1939 lists as "unfair competition" thirty-one diverse types of business practices which run the gamut from bribing employees of prospective customers to selling below cost for hindering competition. The construction of Paragraph 5 urged by the Commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law.

> Such control bears no resemblance to the strictly confined authority growing out of railroad rate discrimination. An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress."

These observations apply with equal force to the functioning of the federal system in the field of labor relations.

C. Additional comments in relation to appellant's argument.

On page 23 of their brief, the appellants refer to the notorious Mohawk Valley formula. The reference with respect to congressional intent to preempt the field and exclude the states from all State action is not readily perceivable.

On page 24 reference is made to the effect of a decision of a State Board which discourages collective bargaining. No such decisions are referred to. The states are quite as sincerely interested in promoting industrial peace by promoting collecitve bargaining as was the Congress in enacting the National Labor Relations Act. There can hardly be any presumption that the administrative boards or the courts of the state will not do their full duty in relation to any such laudable state objective. The presumption must be exactly to the contrary. The argument is without validity. Further, such argument and other arguments which appellants make are arguments which might have been addressed to Congress as reasons why it should preempt the field. The arguments have no bearing upon congressional intent to preempt the field.

It is asserted that the State Board has branded the appellants as outlaws under a State Labor Relations Act and subjected them to the forfeiture of their collective bargaining rights. Appellant's brief, p. 24. If the appellants have been branded as outlaws, then many employers of labor have been branded as outlaws by the National Labor Relations Board and in many instances upon evidence that would not get the prosecution to the jury in a criminal case. Have we reached a stage in our thinking where it is entirely proper and fitting to brand one class of our citizens as "outlaws" and where it is reprehensible—even unconstitutional—to brand another class as outlaws? The answer is—neither Act brands any class as "outlaws". Congressional and State outlawing of conduct does not stigmatize those who engage in the conduct denounced as "outlaws". The administrative remedy, of all remedies that we know of, connotes the least by way of stigmatization of the individual.

It was urged in the Supreme Court of the State that the appellants had been subjected to the forfeiture of their collective bargaining rights. The Supreme Court specifically rejected the appellant's position in this regard (R. 50-52).

It is asserted that the enforcement of a Labor Relations Law must leave the detection and appraisal of imponderables to the essential function of an exclusive expert administrative agency, namely the National Labor Relations Board and to the exclusion of all state expert administrative agencies and that the present emergency has made more imperative than ever before the necessity of a uniform national policy of labor relations. It is not perceived wherein the present emergency has any bearing upon Congressional intent at the time of the enact-

ment of the National Labor Relations Act. Further, it would seem that Congress might well be of the present opinion that the national emergency requires the utmost of state and federal cooperation rather than state exclusion from cooperating.

POINT IV

APPELLANTS HAVE NO STANDING TO RAISE ANY QUESTION OF REPUGNANCE OR CONFLICT, BUT EVEN IF THEY HAVE, THERE IS NO REPUGNANCE OR CONFLICT IN THE PROVISIONS OF THE WISCONSIN EMPLOYMENT PEACE ACT WITH THE NATIONAL LABOR RELATIONS ACT "SO DIRECT AND POSITIVE" THAT THE TWO ACTS CANNOT BE RECONCILED OR CONSISTENTLY STAND TOGETHER—THE ACT DOES NOT STAND AS AN OBSTACLE TO FULL EFFECTUATION OF THE POLICY OF THE NATIONAL ACT.

A. The underlying fallacy of appellants' argument upon this branch of the case (as upon all others) is that of (1) ignoring entirely the constitutional limitations upon congressional power to act and (2) the limited extent to which the Congress did act in enacting the National Act.

Appellants' argument upon this branch of the case takes a wide range. All points raised are academic, so far as the case at bar is concerned. There is an underlying fallacy in the major premise upon which all of appellants' argument is grounded and upon all points which they seek to raise. In their analysis of the scope and purpose of the

National Act, appellants emphasize the congressional intent to promote collective bargaining. Throughout the argument, appellants fail to note the *extent* to which Congress entered the field and the limited scope of the National Act in relation to the congressional policy. As appears from the House Committee Report, No. 1147, 74th Congress, 1st session, cited by appellants at page 40 of their brief, the National Act

> "* * * seeks to redress an inequality of bargaining power by forbidding *employers* to interfere with the development of employee organization, thereby removing *one* of the issues most provocative of industrial strife and bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which the employer cannot trade upon the economic weakness of his employees."

The National Act is concerned with and deals only with employer unfair labor practices. The National Board has jurisdiction only with respect to employer unfair labor practices.

The scope and purpose have been well expressed by this court in *Myers v. Bethlehem Shipbldg. Corp.*, 303 U. S. 41, 82 L. ed. 638 (1938):

> "The declared purpose of the National Labor Relations Act is to diminish the causes of labor disputes burdening and obstructing interstate and foreign commerce; and its provisions are applicable only to such commerce. In order to protect it the Act seeks to promote collective bargaining; confers upon employees engaged in such commerce the right to form, and join in, labor organizations; defines acts of an employer which shall be deemed unfair labor practice; and confers upon the Board certain limited powers with a

view to preventing such practices. If a charge is made to the Board that a person 'has engaged in or is engaging in any . . . unfair labor practice,' and it appears that a proceeding in respect thereto should be instituted, a complaint stating the charge is to be filed, and a hearing is to be held thereon upon notice to the person complained of."

Congressional power in the field in question is necessarily limited in scope. As was said by this court in *Santa Cruz Fruit Pack. Co. v. National L. Rel. Bd.*, (1938) 303 U. S. 453, 82 L. ed. 954, 960:

"* * * The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. A.L.A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 546, 79 L. ed. 1570, 1588, 55 S. Ct. 837, 97 A.L.R. 947. 'Activities local in their immediacy do not become interstate and national because of distant repercussions'."

The business of the Allen-Bradley Company is not interstate commerce—nor are the labor relations of that company interstate commerce. The power of Congress to act at all in the field of labor relations with respect to this company is grounded upon that of protecting interstate commerce from those acts which tend to substantially burden and obstruct that commerce. That is the sole ground upon which the National Labor Relations Act has been sustained as constitutional legislation. *National Labor Rel. Bd. v. Jones & Laughlin S. Corp.*, (1937) 301 U. S. 1, 81 L. ed. 893; *Santa Cruz Fruit Pack. Co. v. National L. Rel.*

Bd., (1938) 303 U. S. 453, 466, 82 L. ed. 954, 58 Sup. Ct. 656. Thus in the latter case the court said:

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several states. * * *
>
> "To express this essential distinction, 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close and substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion."

In the declaration of policy in the National Act, the Congress clearly asserted an intention to act only where an employer's unfair labor practices had a close and substantial relation to interstate commerce. As to when an employer's unfair labor practices denounced by the Act do have this close and substantial relation to interstate commerce so as to tend to substantially burden and obstruct that commerce, the Congress deliberately left the solution

of any such question to the National Labor Relations Board which the Act established.

This court in the cases cited and in other cases has continually recognized the foregoing essential concepts as vital with respect to congressional power to enact the National Labor Relations Act. Appellants throughout their entire argument completely ignore these vital constitutional concepts. The premise upon which appellants' whole argument is grounded with respect to all points asserted by them is that of congressional power to completely regulate labor relations as a subject matter in and of itself and without regard to the foregoing vital constitutional concepts and without regard to the limited extent which Congress did act in safeguarding interstate commerce from burdens and obstructions, namely, the prevention of *employer* unfair labor practices which throttle collective bargaining processes; which tend to promote industrial strife and which therefore tend to substantially burden and obstruct interstate commerce.

B. The case at bar does not involve employer unfair labor practices. It deals with matters entirely outside the scope of the National Act and beyond the jurisdiction of the National Board.

As the case at bar does not involve any employer unfair labor practices, it would seem apparent that it deals with matters entirely outside of the scope of the National Act. It deals with matters over which the National Labor Relations Board has no jurisdiction at all. Appellants' objection that the National Labor Relations Board had exclusive jurisdiction over the unfair labor practices charged

by the company, obviously must be without merit. That Board not only had no exclusive jurisdiction,—it had no jurisdiction. Neither the provisions of the Act, sec. 111.06 (2) (a) and (f), applied in the case at bar nor the order of the Board based thereon, involve any matters with respect to which the Congress legislated in the enactment of the National Labor Relations Act.

C. Appellants are without standing to raise any question of conflict or repugnance between the State and National Acts—no constitutional right of appellants has been invaded.

It would seem very apparent that the appellants have no standing to raise objections as to conflict between the various provisions of the State Act and the National Act. While the appellants assert boldly in their brief in this Court that the Act is unconstitutional, they have never previously taken that position. They have always conceded the Act to be constitutional as applied to all businesses which have no interstate commerce aspects sufficient in a proper case to give the National Board jurisdiction. We start, then, with a constitutional Act. No claim is made that the provisions of the Act applied in the instant case or that the order of the Board based thereon invades any constitutional rights of the appellants. It must follow that what the appellants actually seek to do in the case at bar is to champion the cause of others rather than to champion any constitutional rights of their own that have been invaded. They seek to have this court decide grave constitutional questions as an academic matter. They seek an advisory opinion. They seek a declaratory judgment

without invasion of any constitutional rights of their own.

This case arose in May 1939. Before the Board, the trial court and the Wisconsin Supreme Court, the appellants kept asserting rights under the National Act which were in conflict with rights under the State Act. The National Act confers neither private rights nor remedies. *Amalgamated Utility Workers v. Consolidated Edison Co.*, (1940) 309 U. S. 261, 84 L. ed. 738; *National Licorice Co. v. National L. Rel. Bd.*, (1940) 309 U. S. 350, 60 S. Ct. 569, 84 L. ed. 799. The National Act was in no wise involved in that no employer unfair labor practices were involved. If there was any employer unfair labor practice involved (the record does not disclose any), the appellants were perfectly free to appeal to the National Board to assume jurisdiction. If there was any ground for assumption of jurisdiction by the National Board, that jurisdiction could have been invoked and should have been invoked before the only tribunal (the National Labor Relations Board) that has jurisdiction to determine in the first instance whether it has any jurisdiction or power to proceed, *Myers v. Bethlehem Shipbldg. Corp.*, (1938) 303 U. S. 41, 82 L. ed. 638, or whether, having such jurisdiction, it desires to proceed *Amalgamated Utility Workers v. Consolidated Edison Co.*, (1940) 309 U. S. 261, 84 L. ed. 738.

The appellants have changed their attack in the brief filed in this court. They are no longer asserting rights under the National Act. They center their attack on the proposition that the State Act stands as an obstacle to the effectuation of the policies of the National Act. This change in attack does not alter the fact that, for the appellants to be in a position to raise the questions which they seek to raise, they must show invasion of some constitutional

right of their own. Just what constitutional right of the appellants is shown to be invaded in the case at bar? We find none.

D. The constitutional approach to the question as to whether there is such a repugnance or conflict between the provisions of the two Acts so direct and positive that they cannot be reconciled or consistently stand together* (if such question were presented, which it is not) is just the opposite approach from that which appellants take in their analysis of the question.

It is asserted that "the Federal Act seeks to protect interstate commerce from interruptions due to industrial strife by encouraging collective bargaining; the State Act discourages collective bargaining in labor relations affecting interstate commerce, and so stands as an obstacle to the operation of the Federal Act." (Appellants' brief page 30)

It will be noted that the assertion with respect to the Federal Act ignores all of the vital limitations with respect to Congressional power as well as the vital limitations of the Act itself, that is, the extent to which Congress legislated in encouraging collective bargaining,—prevention of employer unfair labor practices. Apart from this, the assertion that the State Act discourages collective bargaining is not true. The State Act redresses the inequality of bargaining power by forbidding employers to interfere with the development of employee organization and thereby seeks to remove one of the issues most provocative of in-

*Kelly v. Washington, 302 U. S. 1, 82 L. ed. 3, 58 S. Ct. 87, (1937).

dustrial strife and bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which the employer cannot trade upon the economic weakness of his employees to the full extent that the National Act protects against such practices.

The appellants are able to point out but five conflicts between the National and State Acts. In marshaling their arguments the appellants elevate mere words to a point of controlling significance without any regard to whether these words are of any actual significance. Irreconcilable conflicts are predicated upon a stretching of congressional power to act beyond any area which has been recognized as within the scope of congressional power; upon a scope of the National Act with respect to congressional intent beyond any intent manifested in the Act and upon Board power to act beyond what this court has recognized as the scope of Board power to act.

The foregoing is the appellants' approach to federal power, to congressional intent, and to Board action under the National Act. The approach to the State Act is that of adopting as harsh and as irreconcilable an interpretation as ingenuity can place upon the provisions of the two Acts, and by these two approaches arrive at so-called irreconcilable conflicts between the two Acts.

The constitutional approach to any question of irreconcilable conflict must be just the opposite from any such approach. In *State ex rel. Wisconsin Dev. Authority v. Dammann* (1938) 228 Wis. 147, 190, 277 N.W. 278, the Supreme Court of the State of Wisconsin said:

> "* * * This court is bound to give to an act a construction that will avoid constitutional objections

to its validity if it will bear it. *Peterson v. Widule*, 157 Wis. 641, 147 N. W. 966; *Palms v. Shawano County*, 61 Wis. 211, 21 N. W. 77; *State ex rel. Chandler v. Main*, 16 Wis. 398; *Atkins v. Fraker*, 32 Wis. 510; *Attorney General v. Eau Claire*, 37 Wis. 400; *State v. Eau Claire*, 40 Wis. 533; *Bound v. Wisconsin Central R. Co.*, 45 Wis. 543. This rule applies even though the construction which leads in this direction is not the most obvious or natural construction of the act. *Johnson v. Milwaukee*, 88 Wis. 383, 60 N. W. 270. * * *"

This Court has said that the cardinal principle of statutory construction is to save and not to destroy. Thus, in *National L. R. Bd. v. Jones & Laughlin S. Corp.*, (1937) 301 U. S. 1, 81 L. ed. 893, 57 Sup. Ct. 615, this rule was announced as follows:

"The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. *Federal Trade Comm'n v. American Tobacco Co.*, 264 U. S. 298, 307; *Panama R. Co. v. Johnson*, 264 U. S. 375, 390; *Missouri Pacific R. Co. v. Boone*, 270 U. S. 466, 472; *Blodgett v. Holden*, 275 U. S. 142, 148; *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331, 346."

Even by such approach the appellants do not succeed in raising their so-called points of conflict to any constitutional proportion,—do not show "where the repugnance or conflict is so direct and positive that the two Acts cannot be reconciled or consistently stand together."

E. Analysis of the so-called conflicting provisions of the two Acts.

1. The so-called conflict in the declaration of policy.

It is stated that the public policy set forth in sec. 111.01 of the Wisconsin Act omits any positive declaration in favor of promoting collective bargaining and that because of this omission the Wisconsin Act opposes the basic concept of the Federal Act because it conditions the Wisconsin Act to a conflicting interpretation and enforcement. It is further asserted that because of this, the State Act is a persistent obstacle in the way of a uniform national labor policy. Thus, because the Wisconsin Act omits any positive declaration in favor of promoting collective bargaining, an irreconcilable conflict of constitutional proportion is asserted.

The Wisconsin court recognizes that the Act seeks to foster and protect collective bargaining from employer unfair labor practices (the only practices against which the National Act protects collective bargaining) to the full extent and just as completely and effectively as does the National Act. There obviously is no conflict in the dominating purposes of the two Acts insofar as securing to labor its right to bargain collectively is concerned free from the throttling of such right by employer dominance, interference, intimidation, coercion or discrimination.

In *Century Building Co. v. Wisconsin E. R. Board*, (1940) 235 Wis. 376, 291 N. W. 305, both the Board and the courts gave as complete a remedy to employees discriminated against by employer unfair labor practices as the National Board could give in any given case and recognized the letter, spirit and purpose of the law to be

that of promoting collective bargaining free from any discrimination on the part of the employer because of union activities. In that case the Board found that three charwomen employed by the Century Building Company were discharged by the employer *solely because of their membership in a Union* and for the purpose of discouraging membership in such labor organization by discriminating in regard to their tenure of employment. The Board ordered reinstatement and back pay. The company sought to establish by noticing hearings of adverse examinations and by motion to adduce additional testimony that the charwomen were not members of the Union and that the Board's order should therefore not be sustained.

With respect to such contentions, the court said (pp. 381-382):

> "* * * This is an immaterial issue. When an employer dismisses an employee for union activities or discriminates with respect to his tenure for this reason, it is of no consequence that the discharged employee is not actually a member of the union. He might be opposed to unions and steadfast in his refusal to have anything to do with them, but if his employer supposes him to be a member of the union or to be engaged in organizational activities and dismisses him on that account, he engages in an unfair labor practice under the act. Sec. 111.06 (1) (c), Stats. 1939, states that it shall be an unfair labor practice 'to encourage or discourage membership in any labor organization, employee agency, committee, association, or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment.' If the employer rightly or wrongly supposes his employees to be in any stage of organizational activities leading to co-operative bargaining and dis-

criminates against those whom he supposes to be so engaged by dismissing them or otherwise discriminating against them with respect to the conditions of their employment, he engages in an unfair labor practice. Hence, we think that the issue proposed by plaintiff was not material. To construe the act so as to permit an employer to dismiss his employee for real or suspected organizational activities leading to unionization but to forbid him to discriminate against those who had completed the process and become union members would contravene the letter of the law and largely defeat its purpose. * * *."

The realities in relation to this problem are sometimes as important as words which add nothing to realities. Industrial peace is sought to be promoted by the State Act by encouraging the practice and procedure of collective bargaining free from employer dominance, coercion, discrimination, etc., to the full extent that and just as effectively as industrial peace is sought in the National Act by prohibiting employer unfair labor practices which throttle the process.

2. The so-called conflict as to the definition of a labor dispute.

The appellants point out the difference in definition in the National and State Acts. They fail to show any significance of the definition in either Act. In nearly three years' administration of the State Act we have failed to find where the definition of a labor dispute in the State Act is of any significance at all. It is of no significance with respect to sec. 111.05, which covers the subject of

representatives and elections. It is of no significance in relation to unfair labor practices covered by sec. 111.06. No case has ever turned upon this definition. We can think of no case which ever will turn upon it. Irreconcilable conflicts of constitutional proportions can hardly be predicated upon any such situation.

Appellants assert on page 34 of their brief that it is an unfair labor practice under sec. 111.06 (2) (e) for employees to strike unless a majority in the collective bargaining unit of the employees of an employer against whom said acts are directed have voted by a secret ballot to call a strike. The assertion is not true. The section quoted does not regulate when employees may strike. It does regulate intimidating and coercive conduct by the employees when acting in concert unless a majority in a collective bargaining unit of the employees of an employer against whom said acts are primarily directed have voted by secret ballot to call a strike. *Hotel and R. E. I. Alliance, Local No. 122 et al. v. Wisconsin Employment Rel. Bd., et al.* (1941) 236 Wis. 329, 295 N.W. 634.

The appellants not only misstate the import of sec. 111.06 (2) (e) but further assert that the misstated import was confirmed in the *Golden Guernsey Case,* entitled *Wisconsin E. R. Bd. v. Milk & Ice Cream D. & D. E. U. etc.,* (1941) 238 Wis. 379, 299 N.W. 31. This is not true. The decision in the *Golden Guernsey Case* is in no sense grounded upon the application of sec. 111.06 (2) (e) of the Act.

The appellants further assert that under the Federal Act, strikers regardless of their majority status are protected from employer unfair labor practices and retain their rights as employees to vote for the bargaining agency, and that under the State Act these rights are terminated.

The State Act does not terminate any such rights. The protection which the Act affords (not termination of bargaining rights) is *terminated only by action of the Board by its order* in a particular case acting pursuant to authority conferred by sec. 111.07 (4) which so far as material, reads as follows:

> "• • • Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employes with or without pay, as the board may deem proper. • • •"

The Wisconsin Supreme Court specifically so held in its opinion in this case (R. 51-52). How are strikers protected from employer unfair labor practices under the National Act? They are protected by the discretion vested in the National Board with respect to ordering reinstatement. The State Board has a similar discretion to neutralize the effect of an employer unfair labor practice.

It is asserted that this alleged conflict is sharply outlined by the ruling of this Court in the case of *National Labor Rel. Bd. v. Mackay Radio & Telegraph Co.*, (1938) 304 U. S. 333, 58 S. Ct. 904, 82 L. ed. 1381. The assumption seems to be that there is no scope under the State Act for the operation of the principle of the *Mackay Radio & Telegraph Co. Case, supra.* The appellants do not show wherein there is not any scope for the operation of the principle of that case. There is full scope for the operation of the principle of the *McKay Radio & Tel. Co. Case* under

the State Act and the Wisconsin Supreme Court has specifically recognized such to be true. *Appleton Chair Corp. v. United Brotherhood, etc.*, (Dec. 1941) 239 Wis. 337, 1 N.W. (2) 188. In this case the court said at pages 342-343:

> "In dealing with this matter of labor disputes the legislature has recognized a public interest in the relation between employer and employee. It grows out of the employment and the operation of the industry of the employer. The enactments in relation thereto do not destroy nor are they calculated to invade contract rights, but they do seek to protect the public against unfair labor practices and to foster the continuance of that relation in which the public is interested. *Wisconsin Labor R. Board v. Fred Rueping L. Co.*, 228 Wis. 473, 279 N.W. 673. It has been definitely declared that the relation shall not be dissolved because of differing ideas as to the right of collective bargaining or union membership. It is an established and justified rule which gives the authority to the labor board to determine, in a labor dispute over wages or working conditions, whether the act of an employee or employees is a complete and irrevocable termination of the employee status. Bitterness engendered at such time might lead either side to act in utter disregard of the public interest which the legislation has declared shall be protected. As pointed out in the case of *Allen-Bradley Local 1111 v. Wisconsin E. R. Board*, 237 Wis. 164, 183, 295 N.W. 791, the legislature deals with a labor dispute, not primarily as a method of enforcing private rights, but to enforce the public right as well. In that case it was considered, 'in view of the large discretionary power committed to the board, that the act affects the rights of parties to a controversy pending before the board only in the manner and to the extent prescribed by the order' of the board. Appellant urges a review of the ruling

in that case. But there is a direct relation between continuity of the relation of employer and employee and the public interest. It is the order of the board which determines the status and relative rights of the parties. The findings merely furnish the factual situation to which the board in the exercise of its discretion applies the law. The existence of a certain fact does not of itself require the board to reach a certain result. Such an interpretation would deprive the board of the power to do anything but find the facts. Sec. 111.07 (4), Stats., says that 'final orders may' do the things stated. It does not say the board shall do them. It clearly vests in the board a power which it may exercise according to its discretion. In furtherance of public policy where there are unfair labor practices on the part of both employer and employee the board by reason of its disinterested position is authorized to order the remedy most consistent with the public interest. We are of the opinion that the correct rule was announced in the *Allen-Bradley Case, supra.*"

3. The alleged conflict as to rights of minority to bargain collectively.

This argument is grounded upon the provisions of sec. 111.06 (1) (e) of the Wisconsin Act which makes it an unfair labor practice for any employer

"(e) To bargain collectively with the representatives of less than a majority of his employes in a collective bargaining unit, or to enter into an all-union agreement except in the manner provided in subsection (1) (c) of this section."

In connection with this argument it should be noted that there is no provision in the National Act making it an

unfair labor practice to refuse to bargain collectively with a minority union. It was held in *Consolidated Edison Company Case*, supra, that there was nothing in the national Act prohibiting an employer from bargaining collectively with a minority with respect to wages, hours and working conditions for its members *only*. Neither is there any provision in the national Act making it compulsory upon the employer to bargain with such minority union with respect to wages, hours or working conditions for its members only. Such is a matter which is entirely optional with the employer.

The National Act does not confer a right in this regard. It simply does not prohibit collective bargaining with a minority. In this respect, even though the appellants were correct in their interpretation of sec. 111.06 (1) (e) of the Wisconsin Act (which they are not), there would be nothing prohibiting a State from passing legislation prohibiting an employer from bargaining collectively (in the sense which appellants use the term) with a minority group for its members only. Such legislation would not spell conflict. It would seem that such legislation would be entirely analagous to the Missouri Bucket Shop legislation involved in *Dickson v. Uhlmann Grain Co.*, (1933) 288 U. S. 188, 53 S. Ct. 362, 77 L. ed. 691, and that the principle of that case would be controlling. In that case it was alleged that the provisions of the Missouri Bucket Shop Law were in conflict with the Federal Grain Futures Act of September 21, 1922, Ch. 369, 42 Stat. 998. In upholding the Missouri statute, Mr. Justice Brandeis, speaking for the majority, said (pp. 198-200):

> "The federal act declares that contracts for the future delivery of grain shall be unlawful unless the

prescribed conditions are complied with. It does not provide that if these conditions have been complied with, the contracts or the transactions out of which they arose, shall be valid. It does not purport to validate any dealings. * * * But it evinced no intention to authorize all future trading if its regulations were complied with. * * *."

Whether or not the foregoing is the applicable principle is immaterial, as sec. 111.06 (1) (e) does not have the import which appellants attach to it.

There is no provision in the State Act making it an unfair labor practice to bargain with a minority union with respect to wages, hours and working conditions for its members *only*. Nor is there anything in the State Act making it compulsory for an employer to so bargain. This is the exact situation under the National Act.

The foregoing observations are apparent when sec. 111.06 (1) (e) of the State Act is read in connection with sec. 111.02 (5) defining the term collective bargaining, which reads as follows:

"(5) 'Collective bargaining' is the negotiating by an employer and a majority of his employes in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employes in a mutually genuine effort to reach an agreement with reference to the subject under negotiation."

There is no provision in the National Act defining the term "collective bargaining." The State Act simply does not recognize bargaining with a minority union with respect to wages, hours or working conditions of its members only as "collective bargaining." Collective bargaining under the

State Act does not begin until there is a majority union. Hence, when sec. 111.06 (1) (e) prohibits collective bargaining with the representatives of less than a majority of the employes in a collective bargaining unit, what said section does is merely to prohibit the making of a contract with a minority union with respect to wages, hours and working conditions for all employees in the bargaining unit. There is no difference between the National Act and the State Act in this regard. The Board has never considered sec. 111.06 (1) (e), when read in connection with sec. 111.02 (5), to prohibit a minority union from bargaining with respect to wages, hours and working conditions with respect to its members *only*. The Board has applied the State Act exactly as the National Act was applied by this Court in *Consolidated Edison Co. v. National L. R. Bd.*, (1938) 305 U. S. 197, 59 S. Ct. 206, 83 L. ed. 126.

In the performance of its conciliation functions under the Act the Board has continuously encouraged what appellants refer to as collective bargaining contracts made with minorities in a collective bargaining unit when such contracts are made with respect to its members only.

4. The alleged conflict as to the appropriate bargaining unit.

Appellants' entire argument upon this branch of the case is predicated upon an erroneous premise. The premise is that if the State sets up a craft unit and recognizes same, such unit is entitled to recognition under the State Law even though the National Board may set up an industrial unit as the exclusive bargaining unit. The Supreme Court in its opinion in this case (R. 44, 48) specifically recognizes

that any action taken by the National Board determining the appropriate unit is final and conclusive. Just wherein would prior State Board action create any confusion? The National Board oftentimes establishes a unit and subsequently establishes another unit. Certainly, up until the time that the National Board acts it is better to have some unit established which is entitled to recognition than to have no unit established. If a definite unit is established that is entitled to recognition, a long step has been made in permitting collective bargaining to function. Employers not inclined to accept the principle of collective bargaining can throttle the process when no unit entitled to recognition by law has been definitely established. There would appear to be no reason at all why the State should not establish units in accordance with the wishes of the affected employees and pursue such policy up to a point where the Federal Government, acting pursuant to its superior authority and through its agency, determines that some other unit is a more appropriate collective bargaining unit than that which the affected employees themselves want.

Further, if the two acts were identical in language and vested the same discretion in the two Boards, there would be no more and no less conflict. An uncontrolled discretion on the part of two Boards having an absolute discretion offers quite as much opportunity for conflict as two Acts, one of which gives an uncontrolled discretion, see *American Fed. of Labor v. Nat'l. L. R. Bd.*, 308 U. S. 401, 84 L. ed. 347, 60 S. Ct. 300 (1941) and the other of which does not give such an uncontrolled discretion.

5. The so-called major conflict of the unfair labor practices of employees and unions.

Appellants' argument upon this point of the case is most difficult to follow. The unfair labor practices of employees and unions is denominated a major conflict. The Congress, in enacting the National Labor Relations Act, sought to remove *one* of the issues most provocative of industrial strife, namely that of forbidding employers to interfere with the development of employee organization and thus bringing about a general acceptance of the orderly procedure of collective bargaining under circumstances in which *the employer cannot trade upon the economic weakness of his employees.* See House Committee Report, No. 1147, 74th Congress, 1st session, page 16, quoted in appellants' brief at page 40. The National Act by its terms covers only the field of employer unfair labor practices,—a very small segment of the field of labor relations. By reference to this Committee Report, it seems to be argued that the Congress considered the advisability or inadvisability of covering the field of employee and third person unfair labor practices and deemed it unnecessary and unwise to include such employee and third person unfair labor practices in the National Act; by thus considering and rejecting, appellants appear to argue, although they are careful not to say so, that such consideration and such rejection is tantamount to a declaration that the states are prohibited from passing a labor relations act covering employee and third person unfair labor practices. By thus considering and rejecting, the Congress pre-empted the entire field of labor relations. By thus considering and rejecting, Congress in effect legislated.

The argument carried to its logical conclusion necessarily means that the Congress by considering and rejecting usurped the entire police power of the state in the field of industrial relations. Failure to act has conferred rights on employees and third persons. Failure to act has conferred rights on employees and others to do any and all of those things denounced as unfair labor practices in the Wisconsin Act. As the states cannot deal with the problem, the Congress has conferred upon employees the right to intimidate an employee in the enjoyment of his legal rights; the right to intimidate an employee's family; the right to picket the domicile of an employee; the right to injure the person or property of such employee or his family; the right to mass picket; the right to commit acts of violence; and so on, and so forth. See opinion of the Wis. Supreme Court, R. 49.

The Congress either has or has not pre-empted the field of labor relations by the enactment of the National Labor Relations Act. It it has pre-empted the field, the State police power is gone. And it matters not in what form the police power is exerted. If the Congress has not pre-empted the field, the State may exercise its police power, provided no undue or discriminatory burdens are put upon interstate commerce unless a repugnance or conflict between Federal and State action is so direct and positive that the two Acts cannot be reconciled or consistently stand together. *Kelly v. Washington,* (1937) 302 U. S. 1, 58 S. Ct. 87, 82 L. ed. 3. No pretense is made that the Wisconsin Act places any undue or discriminatory burdens upon interstate commerce. Actually, by promoting industrial peace (the same thing the National Act promotes) it promotes interstate commerce and in effect removes interference with interstate commerce. Under such circumstances it is all the more clear that the Act should be sus-

tained, *Standard Oil Co. v. Tennessee,* (1910) 217 U. S. 413, 30 S. Ct. 543, 54 L. ed. 817, unless it is shown that the repugnance or conflict is so direct and positive that the two Acts cannot be reconciled and consistently stand together.

The appellants seem to appreciate the absurd consequences that follow an analysis of their argument with respect to employee and third person unfair labor practices to its logical conclusion. To avoid the absurd consequences they assert that they do not contend that the State police power is gone. See appellants' brief pp. 20 and 51. The argument seems to be that the State may deal with employees intimidating employees in the enjoyment of their legal rights, intimidating an employee's family, injuring the person or property of employees and their families, mass picketing, acts of violence, etc., through the machinery of the civil and criminal law, including injunctions. But by the passage of the National Labor Relations Act, it is argued, the State may not exercise its police power to prevent industrial strife by means of the administrative device,—by means of providing a convenient, expeditious and impartial tribunal by which the major interests in industrial strife may have their respective rights and obligations adjudicated. The administrative device which the Congress has deemed the most effective method of preventing industrial strife may not be used by the States, —the sovereigns primarily concerned with industrial strife and preservation of law and order—merely because the Congress, within a very limited area has deemed the administrative device the most effective means of dealing with employer unfair labor practices which are provocative of industrial strife. The State either has police power to deal with employee and third person unfair labor prac-

tices denounced as such by sec. 111.06, (2) and (3), or it has not. If it has such police power, the matter of how that power shall be exercised is entirely one within the legislature's range of choice. *Tigner v. Texas*, (1940) 310 U. S. 141, 60 S. Ct. 879, 84 L. ed. 1124.

When the appellants concede that the State has police power they concede that the field is not pre-empted. If pre-empted, in a field in which the Congress has power to pre-empt, the State police power is gone, and the State may not supplement. Supplementation in a pre-empted field spells conflict. If the field is not pre-empted, the States may supplement except where the repugnance or conflict is so direct and positive that the two Acts cannot be reconciled or consistently stand together. Obviously, if the State has police power to deal with matters covered by sec. 111.06 (2) and (3) of the Act (employee and third person unfair labor practices) there can be no irreconcilable conflict with the National Act in the constitutional sense as all such matters are entirely beyond the scope of the National Act. The National Act does not even deal with such practices.

The appellants make no reference to sec. 111.04 of the Wisconsin Act, which provides:

> "Rights of employes. Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."

This is the same policy set forth in the Norris-LaGuardia Act. U.S.C.A., Tit. 29, sec. 102, insofar as material provides:

> "Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, *though he should be free to decline to associate with his fellows,* it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definiitons of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted." (Italics ours)

The appellants assert: (B. p. 22)

> "* * * The National Labor Relations Act is only part of a whole legislative program that includes as well such safeguards of collective bargaining as the Norris LaGuardia Anti-Injunction Act, the Wage-Hour law and the Walsh-Healey Act. See *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 498, 60 S. Ct. 982, 998 n. 24."

If it is the National policy that a worker should be free to decline to associate with his fellows as expressed in the declaration of policy in the Norris-LaGuardia Act, just where is there any conflict in policy when the State recognizes this to be true and sets up machinery to make the policy and concept real?

As appellants are unable to spell out any irreconcilable conflict in the employee and third person unfair labor practice provisions of the State Act (sec. 11.06 (2) and (3)), they draw upon the definition of an employee (sec. 111.02 (3) of the State Act) in an effort to spell out a conflict. This definition is of no significance in the administration of the Act as was expressly held in *Appleton Chair Corp. v. United Brotherhood, etc.*, 239 Wis. 337, 1 N. W. (2) 188 (Dec., 1941) as well as in the case at bar. R. 50-52 inc.

Finally, the appellants resort to sec. 111.07 (4) of the State Act which, insofar as material, provides:

> "* * * Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges, or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employees with or without pay, as the Board may deem proper. * * *"

The fact that the Board *may* exercise such a power is asserted by appellants to present an irreconcilable conflict. There are a number of answers to any such contention. In the first place the Board did not exercise any such power in the instant case. In the second place the

Board has never yet exercised this power. It has never exercised it in dealing with an unfair labor practice case even in those situations where the employer's business has no interstate aspects,—where the National Board would have no conceivable jurisdiction. It has never exercised such powers where the interstate aspects of the employer's business are such as to subject him or it to the jurisdiction of the National Board in a proper case. Under the circumstances the following observations of this Court in *Hicklin v. Coney*, 290 U. S. 169, 78 L. ed. 247, 250 (1933) are most pertinent:

> "Another objection, that the Railroad Commission was authorized to regulate the rates of private contract carriers, was answered by the state court in saying that the Commission had never exercised such a power, 'if any it has under the act,' and hence that appellant had no ground for complaint. This is an adequate answer here, on the present showing, as the Court does not deal with academic contentions. *Stephenson v. Binford*, supra (287 U. S. 251, 277, 77 L. ed. 301, 53 S. Ct. 181, 87 A.L.R. 721)."

In the third place there is no provision in the Act which by the mere force of its enactment presents any question of conflict. As was stated by the Supreme Court of the State in this case (R. 52) and reiterated in the *Appleton Chair Corp. case*, supra:

> "As already stated, the manner and the extent to which the act shall apply in a particular case pending before it is committed to the discretion of the Board. Its commands are found in the order, which determines the status and obligations of all parties to the controversy, not in the findings. In the Board's order under review, there is no provision which sus-

pends the status as employees of the fourteen individual appellants found guilty of unfair labor practices. In this case for the reasons stated there is no conflict in regard to employe status."

Appellants assert that the Court held that the Board had power to suspend the bargaining privileges of a union with respect to employers who, in a proper case, would be subject to the jurisdiction of the National Board and that the Court held the same with respect to suspending the bargaining privileges of employees of an employer, who, in a proper case would be subject to the jurisdiction of the National Board. The Court held no such thing as is apparent from the quotation above cited. The Court held that no suspension of status for purposes of administering the Wis. Act had been exercised in the particular case and that for that reason no question of conflict was presented in the case at bar.

It is further asserted that judicial decisions upholding rulings of the Federal Board have established that the employee status of strikers for purposes of collective bargaining, continues regardless of minor acts of disorder (Appellants' Brief, p. 41). Such is not an accurate statement of the holdings. The question presented in the cases cited was whether the National Board in the exercise of its discretionary power, with respect to effectuating the purposes of the National Act, *had power to order reinstatement* of employees, even though they had violated laws of the State by committing acts of assault and battery and breaches of the peace. *Nat'l. L. R. Bd. v. Stackpole Carbon Co.*, 105 Fed. (2) 167 (1939), *Nat'l. L. R. Bd. v. Carlisle Lumber Co.*, 99 Fed. (2) 533 (1938) and *Republic Steel Corp. v. Nat'l. L. R. Bd.*, 107 Fed. (2) 472 (1939), hold that

an order of reinstatement with respect to such employees is within the discretionary power of the National Board.

Insofar as we can find, this Court has never as yet passed upon the question. It denied certiorari in the above cases but this Court has repeatedly held that a denial of certiorari imports no expression of opinion upon the merits of a case. *Hamilton-Brown Shoe Co. v. Wolf Brothers,* (1916) 240 U. S. 251, 258, 36 S. Ct. 269, 60 L. ed. 629; *Atlantic Coast Line R. Co. v. Powe,* (1931) 283 U. S. 401, 403, 51 S. Ct. 498, 75 L. ed. 1142; *Fur Workers Union, Local No. 72 v. Fur Workers Union,* (1939) 105 F. (2) 1.

Nat'l. L. R. Bd. v. Fansteel Metal. Corp., 306 U. S. 240, 256, 83 L. ed. 627, 59 S. Ct. 490 (1939) presents a cognate situation. In that case there was one group of employees that engaged in a sit-down strike and seized the employer's property. This group was formerly discharged by the employer. There was another group of employees who assisted the first group from the outside by way of bringing them things to eat, bedding, food, drink, etc. This latter group was not formerly discharged. The National Board ordered reinstatement as to both groups. This Court held that the order was beyond the power of the Board as to both groups. The Court said: (p. 256)

> "Here the strike was illegal in its inception and prosecution. As the Board found, it was initiated by the decision of the union committee 'to take over and hold two of the respondent's key buildings'. It was pursuant to that decision that the men occupied the buildings and the work stopped. This was not the exercise of the 'right to strike' to which the act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the build-

ings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit. *When the employees resorted to compulsion they took a position outside of the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve.* * * *

"We repeat that the fundamental policy of the act is to safeguard the rights of the self-organization and collective bargaining and thus, by the promotion of industrial peace, to remove obstructions to the free flow of commerce as defined in the act. *There is not a line in the statute to warrant the conclusion that it is any part of the policies of the act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees rights.*" (Italics ours)

In this state of the law, it is by no means clear that the National Board, in the exercise of its discretion, has power to order reinstatement of employees, who are guilty of unlawful conduct in the carrying on of a strike. Even if the National Board has such power, it can hardly be said that it is a national policy to place a premium upon unlawful conduct in the conduct of a strike.

Furthermore, if a state were to enact a law making it mandatory upon its administrative agency to deny reinstatement of employees where they have resorted to force and violence in defiance of the laws of the state, could it be said that such an exercise of the police power of the state presents any question of irreconcilable conflict in the

constitutional sense with the National Labor Relations Act? The State, in the exercise of its police power, would be endeavoring to exercise effectively one of its major functions of government, namely the preservation of law and order. If a state were to enact such a law and to adopt such a policy would the National Board, in the exercise of its remedial function under the National Labor Relations Act, have power to order reinstatement in defiance of the policy of the state law—in defiance of a State policy which has such an intimate relation to one of its major functions of State government? Would such an order, under such circumstances, bear such a close and substantial relation to interstate commerce as to justify the federal interference with state policy? No one knows the answer to that question. It is most difficult to predicate irreconcilable concepts in the constitutional sense where the extent of federal power, in relation to state power, is as yet undetermined.

On p. 45 of their brief appellants state:

> "The conflicts between the two acts boil down to one essential point: the policy of the Federal Act is to require perfected collective bargaining for the breach of its provisions; whereas the policy of the State Act is to require the forfeiture of collective bargaining rights as a penalty for the breach of its provisions. Where the Federal Act requires employers who have committed unfair labor practices to cease and desist therefrom and to accept collective bargaining through freely chosen representatives of their employees, the State Act requires, as a penalty, employees who have violated local police laws to forego collective bargaining privileges and rights."

We have shown that the State Act requires no such penalty. The conflicts are accordingly boiled down to nothing.

Furthermore, Sec. 111.17 provides:

> "CONFLICT OF PROVISIONS; EFFECT. Wherever the application of the provisions of other statutes or laws conflict with the application of the provisions of this chapter this chapter shall prevail, provided that in any situation where the provisions of this chapter cannot be validly enforced the provisions of such other statutes or laws shall apply."

Sec. 111.18 provides:

> "SEPARABILITY OF PROVISIONS. If any provision of this chapter or the application of such provision to any person or circumstances shall be held invalid the remainder of this chapter or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby."

As was said by the Wisconsin Court in this case (R., 51) and reiterated in *Appleton Chair Corp. v. United Brotherhood, etc.*, 239 Wis. 337, 343 (1941), it is considered

> "* * * 'in view of the large discretionary power committed to the board, that the act affects the rights of parties to a controversy pending before the board only in the manner and to the extent prescribed by the order' of the board. * * * "

The Board has ample power, both by virtue of discretion committed to it, and secs. 111.17 and 111.18, above quoted, to so administer the Act as never to present any serious question of conflict with any national policy evidenced in the National Labor Relations Act. It cannot be presumed

that the Board will abuse its discretion. It did not do so in the instant case. It will be time enough to deal with any abuse of discretion if and when a case arises presenting such abuse.

POINT V

THE ORDER OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD, UPHELD BY THE STATE COURTS, WAS NOT BEYOND THE JURISDICTION OF THE STATE BOARD.

Appellants's argument contra upon this point is grounded upon the following proposition:

> "* * * When the State Board took jurisdiction of this case, despite the objections of the appellant, it assumed to deal with matters that were the subject of the exercise of constitutional powers by Congress. The State Act authorized the Board to deprive the individual appellants of their employee status for the purposes of collective bargaining. It authorized the Board to deprive the Union of its capacity to act as an exclusive collective bargaining representative for a period up to one year."

The appellants present nothing new upon this point of the case. The entire argument is grounded upon a so-called irreconcilable conflict between the State Act and the National Act because of the limited discretionary power vested in the "Board" by Section 111.07(4) to suspend rights, immunities, privileges or remedies granted or afforded by the Act for not more than one year. We say "limited" because the Section has to be read in connection with Sec-

tion 111.17 and 111.18 Statutes. In any situation where the Board cannot validly exercise such power, these sections prevent it from exercising such power. Contrary to appellant's assertion, the Wisconsin Court did not hold that the Board could exercise such power in the instant case. It simply held that the Board did not exercise any power under this provision of the Act and that therefore no question of conflict was presented in the case at bar.

Furthermore, the concept that this particular provision of the Act goes to the jurisdiction of the Board is a new concept of jurisdiction. The Board obviously had jurisdiction. The only question that could be presented was whether in relation to this particular controversy, the Board could exercise any discretion granted by this particular clause of the Act. That question would not go to the jurisdiction of the Board. It would simply go to the *power* of the Board to exercise any discretion under this particular clause under the *facts* of the instant case. The Board did not attempt to exercise any power that it may have under this particular provision in the instant case. Nor has it ever in any other case ever exercised whatever powers are conferred upon it by this particular provision. It will be time enough to deal with the constitutional extent of Board power under this provision if and when the Board acts under it.

Furthermore, assume that the Board were to suspend the rights, immunities, privileges or remedies granted or afforded by the Wisconsin Act for a certain period of time with respect to individual employees. It is inaccurate to state that such suspension deprives the individuals of their employee status for the purposes of collective bargaining. Such a suspension would simply mean that so far as those employees are concerned, they are in the same position

they would be in if Wisconsin had no law protecting collective bargaining rights. The appellants urge that the field is preempted and that Wisconsin cannot pass a law protecting collective bargaining rights. If the Board were to suspend the rights, immunities, privileges or remedies granted or afforded by the Wisconsin Act with respect to the employees found guilty of unfair practices in the instant case, they would have just what they seek to establish—no protection except the protection of the National Act. They would not by such suspension lose collective bargaining rights. They would lose protection of the Wisconsin Act—just what they want and seek to establish in this case. What then can be their real complaint in relation to Board power to suspend rights, immunities, privileges or remedies granted or afforded by the Wisconsin Act?

It is asserted that the State Board at the time of its entry of its final order in this case considered that these individuals by the commission of unfair labor practices forfeited their employee status. This is not true. The only time that the Board ever took that position was in the separate decision filed by the Board in *Hotel and R. E. I. Alliance et al. v. W. E. R. B. et al.*, 236 Wis. 329, 295 N. W. 634.

However, such language was not necessary to a decision in that case because the employees involved had engaged in conduct which justified the employer in severing the employee relationship. It was apparent from the facts of the case that the employer had treated such employees as no longer employees of the company. The positions had been filled by the hiring of other employees. The conduct involved in filling such positions by other employees was justifiable conduct and well within the employ-

er's rights under the decision of *Nat'l. L. R. Bd. v. MacKay Radio & T. Co.*, 304 U. S. 333, 82 L. ed. 1381 (1938).

At the time the Board entered its final order in the case at bar, it took a position in relation to this problem exactly similar to that taken by the Court in the instant case,—a position confirmed and adhered to in the *Appleton Chair Corp. case, supra.* The Board urged this exact construction of the Act in its brief filed in the case at bar in the Supreme Court of the State. The language quoted from the Supreme Court's opinion in *Hotel and R. E. I. Alliance et al. v. W. E. R. B. et al.*, 236 Wis. 329, 295 N. W. 634 (appellant's brief page 46) came down many months after the Board had entered its final order in the case at bar and in no wise influenced the Board in making its final order in the instant case.

Such matters are not of any great import—certainly they are not of constitutional proportions—but the appellants are in error when they assert that the Board thought that it was depriving the individual employees of rights, immunities, privileges and remedies granted or afforded by the Wisconsin Act by its mere conclusion that these employees had committed unfair labor practices. It thought no such thing.

POINT VI

THE WISCONSIN EMPLOYMENT PEACE ACT IS NOT AN UNCONSTITUTIONAL EXERCISE OF THE POLICE POWER OF THE STATE.

The appellants are precluded from arguing any such question. They never challenged the validity of the Wisconsin Employment Peace Act as an Act. The closest appellants have ever come to raising any question is that of a feared invalid application of a concededly constitutional statute. They now attempt to urge that in spite of the express provisions of sec. 111.17 and 111.18, if any provision of the Act cannot be applied to *all* situations the entire Act must fall. The contention is obviously without merit. The observations of this Court in *Watson et al. v. Buck et al.*, 313 U. S. 387, 85 L. ed. 1416, 61 S. Ct. 962 (1941) and in *Railroad Comm. of Texas v. Pullman Co.*, 312 U. S. 946, 85 L. ed. 97, 61 S. Ct. 643 (1941) would seem to effectively dispose of the point adversely to appellants' contention. See also *Green v. Phillips Petroleum Co.*, 119 Fed. (2) 466 (1941).

CONCLUSION

For the foregoing reasons it is submitted that the judgment of the Supreme Court of the State of Wisconsin affirming the judgment of the Circiut Court for Milwaukee Coun-

ty, Wisconsin, enforcing the order of the Wisconsin Employment Relations Board should be affirmed.

Respectfully submitted,

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